ISSUE DATE: March 17, 1997

DOCKET NO. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729

ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING CONTRACT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey	Chair
Joel Jacobs	Commissioner
Marshall Johnson	Commissioner
Mac McCollar	Commissioner
Don Storm	Commissioner

In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996

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PROCEDURAL HISTORY

On December 2, 1996, the Commission issued its ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING (the Arbitration Order) in the above-captioned docket. In that Order the Commission required AT&T Communications of the Midwest (AT&T), MCImetro Access Transmission Services, Inc. (MCImetro), MFS Communications Company (MFS), and US WEST Communications, Inc. (US WEST) to submit final contracts containing all arbitrated and negotiated terms by January 2, 1997, for Commission review pursuant to 47 U.S.C. § 252(e). The Order provided that any party objecting to the language in any of the contracts should indicate the basis for the objection in a separate memorandum or brief filed at the same time as the contract. The Order further allowed any interested person to file comments regarding the final contracts within ten days of their filing.

The Arbitration Order also provided a separate process for Commission consideration of any petition for reconsideration. The Commission noted that it "may consolidate any hearings on reconsideration with the hearings on the contract approval proceeding to ensure the most efficient resolution of the docket." Arbitration Order at p. 12.

On December 12, 1996, AT&T and MFS filed petitions for reconsideration.

On December 12, 1996, US WEST filed a petition for reconsideration and a request for a stay of the Arbitration Order.

On December 13, 1996, the Department of Public Service (the Department) filed a petition for reconsideration.

On December 23, 1996, MCImetro, MFS, the Department and the Residential Utilities Division of the Office of Attorney General (RUD-OAG) filed replies to the reconsideration

petitions. On the same date, AT&T filed a reply and a motion to strike certain documents included with US WEST's petition for reconsideration.

On January 3, 1997, two final contracts were submitted for Commission approval--one by US WEST, AT&T, and MCImetro; and one by US WEST and MFS.

On January 13, 1997, the Department, the RUD-OAG, and the Minnesota Independent Coalition (MIC) filed comments on the final contracts.

On January 17, 1997, US WEST filed a response to AT&T's request to strike portions of US WEST's petition for reconsideration.

The Commission met on January 31 and February 3, 1997 to consider all petitions for reconsideration, the interconnection agreement filed by AT&T, MCImetro, and US WEST, AT&T's motion to strike, and US WEST's request for a stay. Due to the pressures on Commission Staff, parties, and regulatory agencies from the timelines imposed by the Federal Act, the Commission decided to defer the contract approval process for the MFS/US WEST contract.[1] That contract was considered by the Commission at a later date.

FINDINGS AND CONCLUSIONS

I. THE ISSUES COVERED IN THIS ORDER

In this Order the Commission will discuss the two motions presented by the parties--US WEST's request for a stay of the Arbitration Order; and AT&T's motion to strike certain documents attached to US WEST's petition for reconsideration.

The Commission will next address the various issues for which the parties requested reconsideration.

Finally, the Commission will consider for approval the final AT&T, MCImetro/US WEST contract submitted in this proceeding. The Commission will discuss in detail the contract language adopted by the Commission for the arbitration agreement. In the first part of this Order section, the Commission will address the disputed issues from the first section of the contract, labeled General Terms and Conditions. In the second part of the Order's contract section, the Commission will discuss any changes or clarifications in the main body of the contract. Because the text of the body of the contract is lengthy, the Commission for convenience will show the issues and any resolution or clarification in matrix form at Attachment A.

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[1] Because the MFS/US WEST contract was for the most part the product of negotiation, the contract is subject to a 90 day deadline for Commission contract approval or rejection under the Federal Act. The MCImetro/AT&T-US WEST contract, which was mostly arbitrated rather than negotiated, is subject to a 30 day deadline for Commission approval or rejection. 47 U.S.C. § 252(e)(4).

II. US WEST'S REQUEST FOR A STAY

A. The Request

In its December 12, 1996 Petition for Rehearing, Reargument, Reconsideration and Request for Stay, US WEST devoted one sentence to the stay: "US WEST further requests that the current Order on this Petition be stayed by the Commission pending review by the federal court."

At the reconsideration/contract approval hearing, US WEST stated that it will suffer irreparable harm from the Commission's arbitration decisions, absent a stay. US WEST stated that it would soon lose its high volume, high revenue business customers due to the artificially low prices set by the Commission. According to US WEST, the promise of a generic cost proceeding is not sufficient; US WEST doubted that such a proceeding would take place within a year. Furthermore, only unbundled rates, not resale rates, will be subject to true-up.

US WEST stated that it has a high likelihood of eventually succeeding on the merits on the disputed issues. US WEST cited the fact that the Eighth Circuit has stayed portions of the FCC Interconnection Order relating to price.

US WEST asked the Commission to adopt US WEST's loop rate and discount rate, on the basis of its request for stay, and proceed to implement the rest of the arbitration decisions. In the alternative, US WEST asked the Commission to rerun and correct the loop rate and discount rate. US WEST asked the Commission to err on the side of protecting US WEST; US WEST can provide refunds later if necessary.

B. Comments of the Parties

1. AT&T

AT&T stated that granting a stay would slow competition, thus injuring not only the prospective new entrants but also Minnesota consumers who are awaiting local competition. Furthermore, given the thorough and independent nature of the Commission's decision process, US WEST has little likelihood of prevailing in federal court. AT&T also argued that granting the stay would frustrate the public policy of fostering local competition, as articulated in the Federal Act and Minnesota telecommunications law.

AT&T contested US WEST's claims of irreparable harm from the implementation of the Arbitration Order. AT&T stated that there is no evidence that US WEST will not be able to compete effectively in the open market. Furthermore, while some loss of market share is inevitable in the new competitive era, loss of market share does not necessarily mean loss of revenue or profitability. AT&T stated that technological innovation and operating efficiencies will be available to US WEST to maintain its profitability.

2. The Department

The Department stated that granting a stay would violate the Act's decision schedule for arbitration agreements and thus cede jurisdiction to the FCC. 47 U.S.C. § 252(e)(4) and (5). According to the Department, the interests of Minnesotans will be better served by decisions made on the state level, by a regulatory agency familiar with local conditions.

The Department also argued that the Commission must balance possible harms when deciding whether to grant the stay. Even if US WEST will be harmed by the Order, AT&T, MCImetro, MFS, and subsequent entrants would be harmed if the Order were stayed.

3. MCImetro, MFS, and the RUD-OAG

MCImetro, MFS, and the RUD-OAG echoed the sentiments of AT&T and the Department. MCImetro stated that US WEST's request for a stay runs counter to the public policy favoring competition, as enunciated by Congress and the Minnesota legislature. MFS argued that granting the stay would nullify weeks and months of work in this proceeding. To prevail, MFS argued, US WEST would have to convince a reviewing court that the FCC Interconnection Order must be ignored.

C. Commission Action

1. Minn. Stat. § 14.65

The Commission's authority to grant a stay pending resolution of a judicial appeal is found in Minn. Stat. § 14.65. That statute states in pertinent part:

> The filing of the writ of certiorari shall not stay the enforcement of the agency decision; but the agency may do so or the court of appeals may order a stay upon such terms as it deems proper.

2. Determining the Merits of the Request for Stay

Neither the Minnesota legislature nor the state courts have established specific guidelines for the Commission when it determines the merits of a request for stay. Minn. Stat. § 14.65 provides the Commission the discretion to grant or deny the request for stay.

When faced with requests for stays in the past, the Commission has found useful guidelines in similar judicial proceedings.[2] In the 1987 Northwestern Bell[3] decision, the Commission relied

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[2] See, for example, the Commission's discussion of a request for stay in In the Matter of an Investigation into IntraLATA Equal Access and Presubscription, Docket No. P-999/CI-87-697, ORDER DENYING REQUEST FOR STAY (March 16, 1995).

[3] In the Matter of the Application of Northwestern Bell Tel. Co., Minneapolis, Minnesota, for Authority to Change Its Schedule of Telephone Rates for Customers within the State of Minnesota, Docket No. P-421/GR-83-600, ORDER GRANTING STAY AND ACCEPTING AGREEMENT TO REFUND (June 30, 1987).

upon a formula set forth in State v. Northern Pacific Ry. Co., 22 N.W. 2d 569 (Minn. 1946). In the Northern Pacific case, the Minnesota Supreme Court found that a stay should be granted where it is necessary to protect the appellant from irreparable harm in case of a reversal and where important questions of law are raised, which, if decided in favor of appellant, would require a reversal.

In determining the propriety of stay requests, the Commission has also applied the factors applied by the Court in injunction proceedings in such cases as Dahlberg Bros. v. Ford Motor Co., 272 Minn. 364, 137 N.W. 2d 314 (1965).

The Commission continues to find these decisions instructive, although they do not govern the Commission's discretion in answering requests for stays. In the end, the Commission must act in its quasi-judicial capacity as it determines if the status quo should be preserved, pending the outcome of the appeal.

Having applied its regulatory expertise and discretion, with the help of the guidelines offered in the aforementioned judicial proceedings, the Commission here finds that US WEST's request for a stay should be denied. The Commission will discuss in turn the factors it applied in reaching its decision.

a. The Object of the Appeal Will Not be Defeated if No Stay is Granted.

US WEST is appropriately pursuing its request for relief from the FCC's pricing policy before the Eighth Circuit Court of Appeals and the U.S. Court of Claims. 47 U.S.C. § 252(e)(6). As discussed below, the Commission's provisions for regulatory compliance proceedings, cost determinations, and true-up will help assure that US WEST's pursuit of possible pricing relief in federal court will remain relevant.

b. The Moving Parties Have Not Made a Showing of Irreparable Harm if the Stay Is Not Granted.

US WEST has failed to show that it will suffer irreparable economic harm if its request for a stay of these proceedings is denied. Certainly, revenues, opportunities, and service emphases will shift for both incumbents and new entrants as the market opens to local competition. US WEST will probably suffer some market erosion as local competition dawns. The Commission agrees with AT&T that US WEST can be expected to vigorously respond with promotions, new service offerings, economic efficiencies, and other strategies designed to win back market share and retain profitability. Furthermore, Congress has determined that US WEST and other incumbents will be allowed to compete in the interLATA toll market as the Telecommunications Act of 1996 is fully implemented. Finally, the Commission has declared the rates for unbundled network elements to be interim, subject to true-up and possible refund pending the outcome of a new proceeding to consider additional evidence on the determination of unbundled network element costs. In the Matter of a Generic Investigation of US WEST Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements (the generic cost proceeding), Docket No. P-442 ,5321, 3167, 466, 421/CI-96-1540.

For these reasons, the Commission finds that US WEST has failed to demonstrate irreparable harm.

c. Granting the Stay Would Result in Disproportionate Injury to Others

As MFS argued at the February 3 hearing, the reconsideration/contract approval proceeding is the culmination of weeks and months of intensive work by the negotiating parties, regulatory agencies, and participants. The Commission is under a nine month deadline to resolve each litigated issue and impose appropriate interconnection conditions. 47 U.S. C. § 252(b)(4)(C). Under the Act's deadline, the Commission has no option of rehearing, retrying, or reopening the proceeding, as suggested by US WEST. Furthermore, prospective entrants and the general public are awaiting the opening of the local market, as established by state and federal statutes.

Given these circumstances, the Commission finds that granting US WEST's request for a stay would cause significant harm to CLECs, consumers, and the regulatory process.

The Commission finds that the harm from granting the stay is not outweighed by any harm to US WEST from denying the stay.

The Commission has conducted a full and careful state arbitration proceeding in accordance with the directives of the Minnesota telecommunications statute and the Federal Act. The Commission has declared prices for unbundled rates to be interim in nature, subject to a generic cost proceeding which is already in progress. At the conclusion of that cost proceeding, the Commission will true-up the interim unbundled rates if a true-up is warranted. The Commission will be carefully considering most US WEST quality standards in a future proceeding. The Commission has also initiated a proceeding to facilitate its consultation with the FCC regarding US WEST's entry into the interLATA toll market under § 271 of the Federal Act. See, Docket No. P-421/CI-96-1114.

US WEST is also free to continue pursuing its claims on pricing in federal court, as allowed by the Act.

In light of these facts, the Commission fails to find any harm to US WEST from denying the stay which would outweigh the harm from granting the stay. Harm to US WEST, if any, has been mitigated to the fullest extent possible under the overall competitive policy promulgated by the State of Minnesota and the U.S. Congress.

d. There Is Little Likelihood of Success of the Appeal

The Telecommunications Act of 1996 and Minn. Stat. § 237.16 require and empower the Commission to make the policy determinations necessary to set reasonable rates, terms, and conditions for local telephone service.

In reaching the policy decisions necessary to implement local competition, the Commission has applied its expertise and discretion according to the procedures and standards articulated in Minn. Stat. § 237.16 and the Federal Act. During this arbitration proceeding, the Commission has carefully considered the extensive factual findings of the Administrative Law Judge Panel

and the written and oral comments of parties and participants. In written findings, the Commission has articulated its rationale for every decision.

The Court of Appeals traditionally defers to an administrative agency's well-reasoned policy judgments and factual determinations based on the evidentiary record. The Commission finds little likelihood that US WEST would prevail in any appeal of the Commission's decisions in this proceeding.

e. Granting the Stay Would Frustrate Public Policy

Both Congress and the Minnesota legislature have clearly articulated a policy of opening local telephone markets to competition. The provisions of the Federal Act are designed to produce the complete contracts necessary to implement local competition. In Minn. Stat. § 237.16, subd. 1(a), the Minnesota legislature stated that it was enacting legislation "...for the purpose of bringing about fair and reasonable competition for local exchange telephone services." In Minn. Stat. 237.16, subd. 8, the state legislature required the Commission to promulgate rules governing local competition by August 1, 1997.

Furthermore, granting a stay would cede Commission jurisdiction to the FCC under 47 U.S.C. § 252(b)(4)(C). This result would be counter to the interests of Minnesota ratepayers, who are better served by a decision reached by the regulatory body charged with setting overall state telecommunications policy.

For these reasons, the Commission finds that granting US WEST's request for a stay would frustrate clearly articulated state and federal public policy.

3. Conclusion

Acting in its quasi-judicial capacity, the Commission has applied its discretion to determine the merits of US WEST's request for a stay. The Commission finds that US WEST has failed to show that the Commission's Arbitration Order should be stayed. The Commission will deny US WEST's request for a stay.

III. AT&T'S MOTION TO STRIKE

A. The Motion

On December 23, 1996, AT&T filed a Reply and Motion to Strike Regarding US WEST's Petition for Rehearing, Reargument, Reconsideration and Request for Stay. In the Motion to Strike, AT&T asked the Commission to strike from the record four documents submitted with US WEST's petition for reconsideration.[4]

[4] AT&T also asked the Commission to strike US WEST's request for a stay included in US WEST's December 12, 1996 petition for reconsideration. US WEST's request for a stay is considered in Section II of this Order.

AT&T argued that there must be closure regarding litigated issues. In light of the nine month deadline for a Commission decision under § 252(a)(4), it is unfair for US WEST to attempt to introduce new evidence on litigated issues at this point. The Commission cannot extend the federal deadline for a decision, hold more hearings, or consider new evidence.

For these reasons, AT&T asked the Commission to strike from the record the following four documents attached to US WEST's reconsideration petition:

- US WEST Attachment 3--Objections to Requirements Contained in AT&T's Proposed Contract
- US WEST Attachment 4--Letter from Congressman Field and Amici Curiae Brief of Congressman Dingell et al.
- US WEST Attachment 6--September 6, 1996 Paper Presented to NRRI Conference
- Affidavit of Matt Kruzick and Related Exhibits regarding AT&T's DMOQs

B. Legal Criteria for Determining the Admissibility of Evidence

In determining the admissibility of proffered evidence, the Commission is governed by the Minnesota Administrative Procedures Act, Minn. Stat. Ch. 14, which directs the conduct of agency hearings. Minn. Stat. § 14.60, subd. 1 gives agencies the following guidance on the admission of evidence:

> In contested cases agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by prudent persons in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, immaterial and repetitious evidence.

The United States Supreme Court has found that administrative agencies may apply a broad rule of evidence. In ICC v. Louisville & Nashville R. Co., 227 U.S. 88, 93 (1913), the Supreme Court stated:

> The [Interstate Commerce Commission] is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties.

The Minnesota Supreme Court has adopted a similar standard of evidence for administrative agencies. In Hagen v. Civil Service Bd., the Court found that an administrative body acting quasi-judicially is not bound by strict procedural rules which circumscribe the action of a court.

Finally, the language of the Telecommunications Act of 1996 provides indirect guidance on the evidentiary standard expected of state commissions reviewing interconnection agreements. At § 252(b)(4)(B), the Act provides in relevant part:

> If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

Under state and federal statutory and case law, therefore, administrative agencies are not bound by strict courtroom rules of evidence. State agencies are expected to use their expertise and discretion in admitting and weighing evidence according to a rule of prudence and common sense. The Commission may admit evidence into the record it considers of probative value and exclude evidence it considers incompetent, immaterial, and repetitious.

C. The Four Documents in Question

1. US WEST Attachment 3--US WEST Objections to Requirements Contained in AT&T's Proposed Contract

a. AT&T

AT&T asked the Commission to strike this document, consisting of "unsworn hypertechnical objections," in its entirety. According to AT&T, its contract was available to US WEST since it was attached to AT&T's July 29, 1996 petition. US WEST's comments on the contract provisions should have been submitted during the arbitration proceeding.

b. US WEST

US WEST stated that the Commission anticipated just such filings when it ordered parties objecting to specific contract provisions to "raise their objections with particularity and explanation" in the contract approval process and/or the reconsideration proceeding. Arbitration Order at p. 10. US WEST was appropriately raising its objections to AT&T's contract language in the format directed by the Commission.

US WEST also stated that the public had the right and need to know that the AT&T contract terms imposed by the Commission are unfair to US WEST.

c. Commission Action

The Commission agrees with US WEST that Attachment 3 represents US WEST's attempt to raise its objections to contract terms with particularity and explanation, as required in the Arbitration Order. US WEST has appropriately submitted its comments at this time, in response to the Commission's adoption of the AT&T contract terms.

The Commission also found the information in Attachment 3 useful in the Commission's consideration of the extensive terms of AT&T's contract.

The Commission finds that Attachment 3 meets the criteria of Minn. Stat. § 14.60, subd. 1 for admission into the record. The Commission will deny this portion of AT&T's motion to strike.

2. US WEST Attachment 4--Letter from Congressman Field to FCC Chairman Hundt; Amici Curiae Brief of Congressman Dingell, et al. to the Eighth Circuit Court of Appeals

a. AT&T

AT&T stated that there is nothing of probative value in the letter from Congressman Field to FCC Chair Hundt criticizing him for the decisions of the FCC Interconnection Order. AT&T stated that the letter consists of "the unsworn ramblings of one person whose views on the FCC First Report and Order are legally irrelevant." AT&T Motion to Strike at p. 6.

AT&T also stated that the Amici Curiae Brief of four Congresspersons in the ongoing case before the Eighth Circuit adds nothing of value to the resolution of issues before the Commission. AT&T noted that the Commission refused to consider the amici brief in the arbitration proceeding between AT&T and GTE.

b. US WEST

US WEST argued that it is important for the Commission to note that Congresspersons have major differences with the FCC regarding such key issues as proxy values and the recombination of unbundled elements.

c. Commission Action

Field Letter. Minn. Stat. § 645.16(7) provides that legislative intent must be obtained from contemporaneous and official records of the legislative body that enacted the bill. The Field correspondence, conducted after the enactment of the Telecommunications Act, is of no probative value in discerning Congressional intent regarding the provisions of the Act. Even if the letter were of evidentiary value, the Commission notes that it would be merely one piece in the overall search for congressional intent. This late-filed document, if viewed in isolation, could be given unwarranted import and thus provide misdirection regarding legislative intent.

The Commission will grant this portion of AT&T's motion to strike.

Amici Brief. For the reasons discussed above, the Commission finds that this document is of no probative value. The Commission also notes that, as a party to the Eighth Circuit appeal, the Commission already has notice of this document. Official notice of this document in the record is neither warranted under the Commission's evidentiary standard nor necessary.

The Commission will grant this portion of AT&T's motion to strike.

3. US WEST Attachment 6--September, 1996 Paper Presented to NRRI Conference

a. AT&T

AT&T asked the Commission to reject US WEST's offer of an article presented at a National Regulatory Research Institute (NRRI) conference by two staffpersons--one from the Maine

public utilities commission and one from the Michigan commission. AT&T noted that this paper on the Hatfield cost models was not submitted during the arbitration proceedings, when it would have been subject to cross examination. AT&T also stated that there are hundreds of counteropinions which could be submitted if such material were considered probative and timely.

b. US WEST

US WEST stated that it is important that the Commission have access to this critical view of the Hatfield model. The information is necessary to show the balance of opinion in the regulatory community regarding the Hatfield cost methods.

c. Commission Action

The Commission finds that this information is of little probative value as it merely represents two staffpersons' opinion and was not officially endorsed by the Maine commission or Michigan commission or by the NRRI. The material is also needlessly repetitious, as the Hatfield cost model was the subject of long and intense questioning and briefing during the arbitration hearings. There seems to be little if any value in admitting this late-filed document which will not be subject to cross-examination.

The Commission will grant this portion of AT&T's motion to strike.

4. Affidavit of Matt Kruzick Dated December 12, 1996 and Related Exhibits

a. AT&T

AT&T moved to strike Matt Kruzick's affidavit and the related exhibits, in which US WEST presents the alleged financial impacts of AT&T's DMOQs and non-performance credits. AT&T stated that admission of this late-filed evidence would deny AT&T due process. Unlike the material in Attachment 3, this information cannot be considered admissible as part of the contract approval process. If the Commission does admit the Kruzick affidavit over AT&T's objection, it should merely use the affidavit to identify DMOQ issues, not to shape the DMOQs or non-performance credits.

AT&T denied US WEST's allegation that its DMOQs were late-filed.

b. US WEST

US WEST countered that AT&T was late in filing its DMOQs. The Kruzick affidavit should be given the same weight as AT&T's DMOQs because opposing parties have had the same opportunity to cross-examine and present evidence on both submissions. True due process would mean that AT&T's DMOQs would be excluded from the record.

c. Commission Action

Upon consideration of the arguments, the Commission will admit the Kruzick affidavit and

accompanying exhibits into the record on a limited basis. The Commission will use the information in this document for the limited purpose of identifying on a preliminary basis the issues that should be addressed in a forthcoming compliance proceeding on DMOQs (see section IV(I) of this Order). For this limited purpose, the information presented fulfills the evidentiary criteria of Minn. Stat. § 14.60, subd. 1. Confined to this purpose, the evidence should be helpful to all parties as the Commission further explores the DMOQ issue in its future compliance proceeding.

IV. RECONSIDERATION ISSUES

A. Introduction

US WEST, AT&T, MFS, and the Department asked for reconsideration of the Commission's decisions on various issues in the December 2, 1996 Arbitration Order. In the remainder of this section, the Commission will review the issues according to the issue format established in the Arbitration Order.

B. Interconnection and Collocation

1. Points of Interconnection

a. The Arbitration Order

The Commission found that the Federal Act requires US WEST to allow interconnection at any technically feasible point on its network requested by a CLEC. If a CLEC wants only one point of interconnection (POI) per LATA, that is acceptable. The Commission found that US WEST had not met its burden of proving that one interconnection point per LATA is technically infeasible.

b. The Request for Reconsideration

US WEST asked the Commission on reconsideration to require a point of interconnection in each local calling area it services. Without such a requirement, US WEST argued, network reliability could suffer if a CLEC chose one point of interconnection at the access tandem. US WEST also argued that one interconnection point per LATA would increase the investments US WEST must make in the network. Finally, US WEST argued that the Commission's decision would require US WEST to use its intraLATA toll facilities without compensation as it transports calls handed off from the CLEC.

MFS argued that the Act specifically entitles CLECs to choose their point or points of interconnection. US WEST's hypothetical "system overload" is without adequate support in the record.

AT&T argued that US WEST's complaints regarding decreased network efficiency and increased costs do not support the necessary finding of technical infeasibility.

MCImetro argued that an incumbent's need to build additional capacity to meet the demands of new competitive entrants does not make interconnection at a single point technically infeasible. MCImetro also noted that it is willing to work with US WEST to supply forecasts

and to share plans.

c. Commission Action

The Commission finds that US WEST raised no new fact or argument to support its request for reconsideration of this issue. The Act states that the incumbent must provide interconnection with its network; at any technically feasible point; that is at least equal in quality to that provided by the incumbent to itself or to any affiliate or other party; on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 251 (c). US WEST has failed to meet its burden of proving that one interconnection point per LATA would be technically infeasible.

The Commission reaffirms that it will require US WEST to allow interconnection at any technically feasible point on its network requested by the CLEC.

2. Types of Collocated Equipment Permitted

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that US WEST must allow AT&T and MCImetro to collocate Remote Switching Units (RSUs) and Digital Loop Carriers (DLCs) at US WEST's premises. The Commission stated that it would allow the collocation of these types of equipment "with the understanding that the CLECs will not use the collocation of RSUs to avoid paying appropriate toll access charges to US WEST." Order at p. 16.

b. The Request for Reconsideration

US WEST asked the Commission to reconsider its Order and find that RSUs are not necessary for interconnection or access to unbundled network elements and thus need not be collocated under the Act. To decide otherwise would mean that every type of telecommunications equipment must be collocated, regardless of use. US WEST also argued that there is no meaningful way to enforce the misuse limitations the Commission's Order seeks to impose.

AT&T stated that the FCC Order left to state commissions the task of determining whether a particular piece of equipment is used for interconnection or access to unbundled elements. FCC Interconnection Order at Paragraph 581. The Commission properly exercised that discretion, based on the record and the ALJ's recommendation, when it found that US WEST had not met its burden of proving that RSUs are unnecessary for interconnection or access to unbundled elements.

MCImetro stated that US WEST failed to carry its burden of proving that RSUs are not "used" or "useful" for interconnection or access to unbundled elements. MCImetro noted that AT&T's witness testified concerning the use of RSUs to avoid quality degradation--proof that the units are useful in obtaining interconnection and access to unbundled elements. MCImetro also argued that there is no reason to assume that CLECs will make improper use of RSUs and no reason to allow US WEST's unsubstantiated concerns to overcome the requirements of the Act.

c. Commission Action

The Federal Act and the FCC Interconnection Order require incumbents to provide for physical collocation of equipment that is necessary, used and useful for interconnection or access to unbundled elements. The FCC has left to state commissions the determination of the equipment that falls into this category. AT&T has testified that collocation of RSUs is necessary to assure parity with the level and quality of service US WEST is able to offer. US WEST has failed in its burden of proving either that the collocation is not technically feasible or that the equipment is not necessary, used or useful.

The Commission is not persuaded by US WEST's unsupported allegation that CLECs will misuse collocated RSUs to avoid legitimate payments for toll access charges. It is reasonable to assume that a monitoring system for intrastate toll access charges can and will be developed, particularly in light of CLECs' expressed willingness to cooperate in reporting. If abuses should occur in the future, US WEST may bring a complaint before the Commission.

For these reasons, the Commission reaffirms its finding that US WEST must allow AT&T and MCImetro to collocate Remote Switching Units and Digital Loop Carriers at US WEST's premises.

3. Premises at Which Collocation Should be Allowed

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission cited the FCC's definition of the term "premises" in the FCC Interconnection Order at Paragraph 573:

> We therefore interpret the term "premises" broadly to include LEC central offices, serving wire centers and tandem offices, as well as all buildings or similar structures owned or leased by the incumbent LEC that house LEC network facilities. We also treat as incumbent LEC premises any structures that house LEC network facilities on public rights-of-way, such as vaults containing loop concentrators or similar structures.

The Commission also noted that the ALJ Panel found that the FCC concept of "premises" includes structures that house network facilities on public rights-of-way, such as vaults and environmental huts.

The Commission found that US WEST must permit collocation at any of the forms of premises mentioned by the FCC and the Panel.

b. The Request for Reconsideration

US WEST asked the Commission to reconsider its decision and require CLECs to make a bona fide request (BFR) for any collocation in non-end office structures. US WEST argued that the Commission's Order as it stands fails to recognize that the FCC Order requires collocation *only* where it is technically feasible. Given this FCC emphasis, the BFR process would permit the case-by-case evaluation necessary to require collocation.

AT&T argued that adoption of US WEST's position would in effect impose a presumption that collocation is technically infeasible. The BFR process would improperly place the burden on the CLEC to justify the means of entry into the local market. MCImetro agreed, stating that the BFR process would "turn the FCC Order on its head." MCImetro's Response to Petitions for Reconsideration at p. 15.

c. Commission Action

The Commission finds that US WEST has failed to offer any new fact or argument on this issue.

The FCC's broad definition of the "premises" at which the incumbent must allow collocation is part of Congress's and the FCC's overall policy of facilitating the swift transition to local competition. Understanding that the transition will be unwelcome to incumbents, the FCC opened the incumbent's facilities broadly to collocation, while allowing an exception to the collocation obligation for technical infeasibility or space limitations. The burden is thus placed squarely on the incumbent to prove that the collocation is technically infeasible or constrained by space restrictions.

Without any specific factual foundation for its allegation of technical infeasibility, US WEST argues that a BFR requirement must be imposed on the process. The Commission finds that such a requirement would reverse the thrust of the FCC's collocation language: the burden would no longer be on the incumbent to prove that collocation is infeasible, but would be on the new entrant to prove its case for collocation. Such a construction runs counter to the goal of Congress and the FCC to remove barriers to competitive entry.

The Commission will reaffirm its decision to require US WEST to permit collocation at any of the forms of premises mentioned by the FCC and the ALJ Panel.

C. Extent of Unbundling

1. Subloop Unbundling

a. The Arbitration Order

In its December 2, 1996 Order, the Commission addressed AT&T's and MCImetro's request that US WEST be required to unbundle the local loop. The Commission ordered US WEST to unbundle the local loop to separate loop distribution--the portion of the local loop that runs from the network interface device at the customer premises to the feeder distribution interface (FDI). To alleviate US WEST's concerns over multiple CLEC technicians accessing the FDI, the Commission ordered US WEST to continue to perform any necessary function within the FDI.

b. The Request for Reconsideration

US WEST asked the Commission to reconsider its Order and require a CLEC requesting subloop unbundling to engage in a BFR process. US WEST would decide in each case if the requested unbundling were technically feasible. US WEST stated that competition would

result in an increased level of access to the FDI; the wear and tear on the facilities could reduce network reliability to the point of making access at the particular point technically infeasible.

AT&T argued that US WEST is improperly attempting to create a presumption that subloop unbundling is infeasible. This is contrary to the FCC rules and the Commission's procedural interconnection Order[5], which both place the burden of proof on US WEST. According to AT&T, US WEST's suggestion that increased cost would result in a finding of technical infeasibility is incorrect. MCImetro stated that US WEST's insistence on a BFR process would have the effect of deterring the development of facilities-based competition.

c. Commission Action

The advent of local competition will bring about an increased level of access to US WEST's network. The Commission presumes that Congress and the FCC contemplated this fact when they established the rules facilitating the opening of the local loop to competition. The Act and the FCC Rules allow an incumbent to refuse access to the loop if the incumbent shows that access is technically infeasible or will result in a degradation of network reliability. In this case, US WEST has failed to prove that increased access and "wear and tear" on the FDI meet the standards for a refusal to open the loop. On the other hand, MCImetro has shown that, in a roughly equivalent situation, a competitor's access to the subloop has not resulted in a downturn in network reliability. The Commission has further addressed US WEST's concerns by allowing US WEST the sole access to the FDI.

The Commission finds that US WEST's request for a BFR process for each request for subloop access reverses the thrust of the Act and the FCC Rules and the burden of proof established in the Commission's own procedural Order. The Commission affirms its decision to require US WEST to subloop unbundle at the FDI.

2. Connections to the Network Interface Device

a. The Arbitration Order

In the December 2, 1996 Order, the Commission required US WEST to allow AT&T and MCImetro to connect their loops directly to US WEST's network interface devices (NIDs[6]) where there is available capacity and over voltage protection and adequate grounding of US WEST's unused loops can be accomplished. The Commission required AT&T and MCImetro to cover the costs associated with the NID connection and any costs to upgrade the NID.

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[5] In the Matter of AT&T Communications of the Midwest, Inc.'s Petition for Arbitration of Rates, Terms, and Conditions for Interconnection and Related Arrangements with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Docket No. P-442,421/M-96-855, ORDER GRANTING PETITION AND ESTABLISHING PROCEDURES FOR ARBITRATION (August 9, 1996).

[6] A NID is a gray box, situated on the side of a house or in the basement of a building, at which the telephone company's facilities are connected with the inside wiring of the customer premises.

b. The Request for Reconsideration

AT&T asked the Commission to find that costs associated with upgrading the NID are costs associated with unbundled network elements and thus will be recovered by US WEST as part of its total element long run incremental cost (TELRIC) cost study. The CLEC need not pay any additional charge. In the alternative, if the Commission did not find that NID upgrade costs are included in the TELRIC study, AT&T asked the Commission to find that US WEST should recover the costs in a competitively neutral, nondiscriminatory fashion. The Commission should treat the costs as costs of conversion to competition, for which the entire industry, including the incumbent, is responsible.

US WEST stated that a CLEC's request for direct connection to a NID will cause US WEST to incur direct, out-of-pocket costs it would not otherwise experience. US WEST argued that AT&T and MCImetro sponsored the Hatfield model of TELRIC pricing and thus should know if the TELRIC cost study included additional NID costs. Since AT&T and MCImetro did not demonstrate that costs of connecting and upgrading the NID are included in the Hatfield TELRIC cost model, the Commission was justified in concluding that US WEST's additional costs would not be recovered through TELRIC rates.

c. Commission Action

At this time, the Commission will not modify its decision to require AT&T and MCImetro to cover US WEST's costs of connecting and upgrading NIDs. At the same time, the Commission notes that it adopted the Hatfield model of determining network element costs on an interim basis, subject to true-up. Since that time, the Commission has initiated a generic cost proceeding, in Docket No. P-442,5321,3167,466,421/CI-96-1540, to determine the costs for US WEST's unbundled network elements. In that proceeding, the Commission will examine all TELRIC costs, including costs of connecting and upgrading a NID. Once TELRIC costs are developed and adapted to network elements, US WEST will recover its costs incurred for connecting and upgrading NIDs (if it is not presently doing so) through its monthly recurring charges to CLECs for the use of its NIDs.

The Commission therefore reaffirms its December 2, 1997 Order regarding NID upgrade costs at this time, and requires that the TELRIC costs of US WEST's NID, including any upgrades, be developed in the ongoing generic cost proceeding.

3. Dark Fiber

a. The Arbitration Order

In its December 2, 1996 Order, the Commission found that US WEST had failed to present evidence that a request to unbundle dark fiber may be rejected under the standard of the Act or the FCC Rules. The Commission distinguished between laid fiber, which must be unbundled, and fiber in a warehouse, which would be part of US WEST's inventory and need not be unbundled. The Commission stated that US WEST can mitigate its concerns regarding the availability of fiber for its own future use by limiting the length of any contract with a CLEC for the lease of dark fiber.

b. The Requests for Reconsideration

Both US WEST and AT&T asked for reconsideration of this issue.

US WEST asked the Commission to find that dark fiber is not used by a carrier to provide telecommunications service and therefore does not fit the definition of "network element" under the Act. Until the electronics are installed and the fiber is "lit," US WEST maintained, the fiber does not fulfill the definition of a network element.

According to AT&T, the Act does not support US WEST's argument that transmission facilities constitute network elements only if they are presently in use by US WEST; the Commission properly rejected the argument. MCImetro argued that dark fiber is "used" in the provision of telecommunications service in the same way that excess capacity in an FDI box is used. Both types of equipment are network elements under the Act.

In its petition for reconsideration, AT&T stated that the Commission's December 2 Order properly required US WEST to unbundle dark fiber. The Commission did not, however, specifically state that dark fiber is an unbundled network element. AT&T asked the Commission to clarify its Order by stating that dark fiber is a network element which must be unbundled. AT&T asked the Commission to state that dark fiber is subject to TELRIC based pricing, all provisions of the AT&T contract, and the Federal Act and FCC Rules.

US WEST reiterated its position that dark fiber is not a network element. US WEST also stated that the Commission cannot mean that all terms of the AT&T contract would apply to this area, or the Commission's Arbitration Order would not have allowed US WEST to negotiate with CLECs regarding the terms of leases for dark fiber.

c. Commission Action

The Commission finds that dark fiber is clearly a network element, which US WEST must unbundle under the terms of the Federal Act and FCC Rules. The Commission so clarifies its December 2 Order.

The Commission confirms that all provisions of the Federal Act, the FCC Interconnection Order, and the Commission's Arbitration Order regarding unbundled network elements will apply to dark fiber, with one exception. US WEST, as the current carrier of last resort, has a legitimate concern regarding availability of fiber for future use. If US WEST anticipates the need to use specific fiber within a time period shorter than the term of the overall interconnection agreement, US WEST may negotiate a separate term for the lease of dark fiber.

4. Combining Unbundled Elements

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that the FCC's Interconnection Order is clear regarding the issue of a CLEC's recombination of unbundled elements: incumbents cannot restrict a CLEC's use of the unbundled elements under the FCC Rules. The Commission noted that the Eighth Circuit Court of Appeals will be addressing

legal arguments US WEST has raised regarding this issue.

The Commission ordered US WEST not to place restrictions on the purchase or recombination of unbundled network elements by AT&T, MCImetro, or MFS.

b. The Request for Reconsideration

US WEST asked the Commission to reconsider its Order and prevent CLECs from engaging in what US WEST terms "sham unbundling": the purchase of a finished service solely through the purchase of unbundled network elements at Commission-established rates. In the alternative, US WEST asked the Commission to impose a Residual Unbundling Charge--the difference between the finished service rate and the sum of the prices of the unbundled elements making up the service.

US WEST gave the following reasons the Commission should reject the FCC Rules and forbid unrestricted recombination of unbundled elements: the Commission need not follow the FCC Rules, because they are inconsistent with the Act; unrestricted recombination of unbundled elements will allow the CLECs to engage in rate arbitrage between the resale rate and the TELRIC rate for unbundled elements; IXCs will use unrestricted use of unbundled elements to evade statutory prohibitions against joint marketing of local and interLATA services; unrestricted use of unbundled elements will dramatically reduce US WEST's revenue stream.

AT&T responded that US WEST has lost this issue before Congress, the Eighth Circuit Court of Appeals (which did not include the issue in its stay of portions of the Rules), the ALJ Panel, and the Commission. The Commission cannot simply ignore the FCC Order, which clearly allows unrestricted recombination of unbundled elements.

MCImetro stated that US WEST's cited case authority does not hold that the Commission has the power to declare invalid the regulations promulgated by a federal agency pursuant to an express direction of Congress. The Supremacy Clause of the U.S. Constitution does not permit the Commission to substitute its own judgment for the FCC's. Moreover, the Act itself allows the combination of elements.

MFS stated that US WEST's citations to an amicus brief to the Eighth Circuit by four members of Congress regarding their post-enactment interpretation of the Act are inappropriate and unpersuasive.

c. Commission Action

Section 251(c)(3) of the Federal Act places the following duty (among others) upon incumbent local exchange carriers:

> UNBUNDLED ACCESS. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements

in order to provide such telecommunications service.

Section 252(c)(1) of the Federal Act states:

> STANDARDS FOR ARBITRATION. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--
>
> > (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251.

The FCC Interconnection Order at Paragraph 292 states that incumbents "may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements, nor may they restrict requesting carriers from combining elements with any technically compatible equipment the requesting carriers own."

In granting a partial stay of the FCC Interconnection Order, the Eighth Circuit Court of Appeals did not include the rules concerning the combination of unbundled elements.

The Commission, therefore, continues to agree with the ALJs that the Commission's duty is clear: there is no basis in law to impose the restrictions sought by US WEST. The cases cited by US WEST do not support the Commission's rejection of the FCC Interconnection Order. Rather, the cases stand for the proposition that *a court* must reject administrative regulations that are inconsistent with the underlying statutory mandate or that frustrate policies which the legislative body sought to implement.

US WEST's arguments regarding CLECs engaging in rate arbitrage, the impact of unrestricted network element combination on US WEST's revenues, or the effect of the rules on CLECs' joint marketing of local and interLATA service, are arguments which were presumably raised before Congress and the FCC. Those bodies have spoken and the Commission must abide by their decisions. The Commission must reaffirm its decision to apply the FCC Order on this matter. The Commission will therefore not allow contract language which would place restrictions on the purchase or recombination of unbundled elements. This pertains both to language precluding unrestricted recombination unbundled elements, and to language allowing a Residual Unbundling Charge, which would have the same effect.

D. Resale

1. Services to be Made Available

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission stated that the Act requires US WEST to offer for resale all retail services provided to its end user customers, except those provided to telecommunications carriers. The Commission found that the Act provides no exceptions for deregulated services, offerings subject to volume discounts, or enhanced services. The Commission stated that US WEST need not make its promotions of less than 90

days available for resale to its competitors.

b. The Request for Reconsideration

Both AT&T and US WEST asked for reconsideration of this issue.

AT&T asked the Commission to modify its Order to specify that promotions of less than 90 days must be offered for resale, although not at a wholesale discount.

US WEST responded that AT&T in substance treats the promotion as the service, rather than as an aspect of the price of the service that is being promoted. The Commission should not rob incumbents of their competitive tools by requiring them to pass on their short term promotions to CLECs.

The Department agreed with US WEST. The Department argued that US WEST is not required by federal law to promote use of its services by competitive resellers. CLECs are free to offer their own promotions if they so wish.

US WEST asked the Commission to reconsider its Order and find that the Act exempts deregulated services, services offered at volume discounts, and enhanced services from the wholesale discount resale requirement.

AT&T, MCI, and MFS argued that these services are clearly telecommunications services to which the wholesale discount resale obligation applies.

c. Commission Action

The Commission finds that US WEST has offered nothing new to require the Commission to reconsider its finding regarding US WEST's offering of deregulated services, services offered at a volume discount, or enhanced services. These services are under the definitions of services which must be offered by an incumbent under its wholesale resale obligations.

The Commission will deny AT&T's request to modify the Arbitration Order to find that US WEST must offer for resale its promotions of less than 90 days. The Commission agrees with US WEST that US WEST must make underlying services available for resale at the wholesale discount, but need not make available any promotions of less than 90 days associated with those services. This finding is consistent with Paragraph 948 of the FCC Interconnection Order, which states in part: "We believe that, if promotions are of limited duration, their procompetitive effects will outweigh any potential anticompetitive effects."

2. Resale Restrictions

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that residential services, Lifeline services, contract services, special arrangements, packaged services, discounted services, and promotional offerings offered for a period of more than 90 days should be restricted to resale to the same class of customers eligible to purchase the service from

US WEST. The Commission found that US WEST had met its burden of proving that these restrictions are reasonable and nondiscriminatory means of preventing anti-competitive cross-class arbitrage. The Commission also found that grandparented retail services must be available for resale, but only to existing retail customers of the service.

b. The Requests for Reconsideration

Both the Department and MFS asked for reconsideration of this issue.

The Department stated that US WEST failed to meet its burden of proof to support the restrictions imposed by the Commission, or to rebut their presumption of illegality. The Department also stated that state law imposes more severe resale restrictions than federal law. The Department cited Minn. Stat. § 237.121, which precludes resale restrictions for services other than residential and classroom. Any resale restrictions beyond these, the Department argued, are illegal.

At the February 3, 1997 Commission meeting, AT&T and MCImetro expressed agreement with the Department's position.

MFS argued that the FCC allows incumbents to rebut the presumption against cross-class restrictions only if the restrictions are narrowly tailored. The restrictions adopted by the Commission are not narrowly tailored or clear and will invite future disputes. Unless the Commission reconsiders its decision, US WEST will be able to use the definition of "class of customers" to unfairly limit competition.

US WEST stated that its witnesses had testified that the Company's rate structure is currently unbalanced and contains numerous cross-subsidies. Until US WEST's rate structure is rebalanced in the new competitive era to eliminate cross-class subsidies, the Commission can maintain some continuity by restricting resale to the class of customers eligible to purchase from US WEST.

c. Commission Action

The FCC gave state commissions the discretion to allow resale restrictions if they are reasonable and nondiscriminatory. The FCC also recognized that incumbents would have in place certain rate structures and cross-subsidies which must be accounted for as the industry moves to competition. At Paragraph 962 of the Interconnection Order, the FCC observed:

> State commissions have established rate structures that take into account certain desired balances between residential and business rates and the goal of maximizing access by low-income consumers to telecommunications service. We do not wish to disturb these efforts by prohibiting or overly narrowing state commissions' ability to impose such restrictions on resale.

US WEST has shown that the historic class distinctions in Minnesota justify the resale restrictions allowed in the December 2 Order, until major rate rebalancing can be accomplished. The restrictions are reasonable and nothing suggests that they are discriminatory in nature. US WEST has met its burden of proving that the restrictions allowed in the December 2 Order are reasonable and nondiscriminatory means of preventing anti-

competitive cross-class arbitrage.

The Commission notes that Minn. Stat. § 237.121, subd. 5, cited by the Department, prohibits a "telephone company or telecommunications carrier" from imposing restrictions beyond those mentioned in the statute. Here, the restrictions will be imposed as a result of a Commission Order settling interconnection arbitration issues, in accordance with the Act and the FCC Rules.

The Commission denies the Department's and MFS's requests for reconsideration of this issue.

3. Branding

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission noted that the parties were in agreement that US WEST would brand operator services and directory assistance; costs of providing the service would be borne by the party requesting it. The Commission ordered US WEST to file proposed rates for branding within 45 days of the Order, after which parties should negotiate mutually agreeable branding charges.

The Commission further found that US WEST must provide branding of its repair and maintenance services provided on behalf of a CLEC at the request of the CLEC.

b. The Request for Reconsideration

US WEST asked the Commission to clarify its Order by stating that US WEST must provide proposed rates for branding within 45 days after a CLEC makes a commitment as to the level of branding it is requiring. US WEST should not be required to submit proposed branding rates at this time, because costs will depend on the type of branding the individual CLEC is requesting.

AT&T responded that CLECs should not be expected to make a commitment to branding until rates are available to make an informed business decision. AT&T also stated that it has already identified for US WEST the type of branding service it requires.

c. Commission Action

The December 2, 1996 Order required US WEST to file proposed rates for branding of operator services and directory assistance within 45 days of the Order. The Commission finds that branding requirements for these services can be expected to be consistent among CLECs. US WEST should be able to develop a rate structure and make it available to the CLECs so that the CLECs can make decisions based upon the information provided. The Commission reaffirms this portion of its Arbitration Order.

The Arbitration Order did not require US WEST to develop proposed rates for branding of its repair and maintenance services. CLEC requirements in this area may vary, requiring rates to be developed for the particular set of circumstances. The Commission therefore clarifies its December 2 Order by stating that US WEST must file proposed rates for repair and maintenance branding within 45 days of a CLEC's specific request.

4. Wholesale Rates

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that the FCC's "avoidable cost" standard of setting wholesale rates is consistent with the language of the Act. Although the relevant FCC rules are stayed and therefore not binding on the Commission, the Commission found that the FCC Interconnection Order provides useful guidance in setting appropriate discount rates. The Commission also found that wholesale rates should not be based on the policy objective of encouraging the development of facilities-based competition.

b. The Request for Reconsideration

US WEST asked the Commission to find that it had erred by establishing wholesale rates based on US WEST's avoidable costs rather than on costs that will actually be avoided. US WEST asserted that the Eighth Circuit stay prohibits the Commission's adoption of the FCC's cost methodology or the FCC's policy eliminating non-cost factors from cost studies.

AT&T stated that the Commission's adopted cost methodology is consistent with the Federal Act. According to AT&T, § 252(d)(3) of the Act does not require that US WEST actually "shed" costs in order for the costs to be considered "avoided." AT&T noted that US WEST's advertising expenses pertaining to its retail services will not be shed when US WEST begins to provide services for resale, and may actually increase. These costs, however, should be considered avoided in setting wholesale rates. US WEST's proposed methodology would require CLECs to fund US WEST's advertising costs, which the new entrant will also incur.

AT&T also stated that the underlying premise of the Eighth Circuit stay is that the states, not the FCC, should determine pricing decisions. Nothing in the stay prohibits the Commission from using the FCC Interconnection Order as guidance as the Commission forms a decision based on its view of the policies underlying the Act.

MIC addressed the issue of wholesale rate methodologies in its public interest comments concerning the final contracts. MIC supported US WEST's contention that wholesale rates should be based on avoided costs rather than avoidable costs. According to MIC, the Commission's decision would depress US WEST's revenues and unfairly advantage competitors.

c. Commission Action

In this arbitration proceeding, the Commission took administrative notice of the FCC Interconnection Order in its entirety and considered the stayed portions of the FCC Order as it did other evidence in the case. Nothing in the stay itself or in relevant law prohibits the Commission from considering the methods and policies expressed in the FCC Interconnection Order as the Commission reaches its independent decision.

The FCC Interconnection Order at Paragraph 912 states that state commissions are to make "an objective assessment of what costs are reasonably avoidable when a LEC sells its services

wholesale." The FCC defines avoided costs as "those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." The Commission finds that this standard of determining rates based on an objective incumbent's avoidable costs is open, calculable, relatively protected from accounting "gaming," and consistent with the language and intention of the Federal Act.

The Commission reaffirms its decision regarding the determination of wholesale rates.

5. Residential Services for Resale

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission required US WEST to provide residential services at wholesale rates based on avoided cost.

b. The Request for Reconsideration

US WEST asked the Commission to set the avoided discount for residential rates at zero, until such time as residential services are priced above cost. Requiring US WEST to provide wholesale residential service at prices below cost would violate the state and federal constitutions, force US WEST to subsidize competitors, and retard the development of facilities-based competition.

AT&T stated that requiring US WEST to offer residential service at the wholesale discount is consistent with both the Federal Act and the FCC Rules. MCImetro stated that the Commission has never determined that residential services are priced below cost. MCImetro also stated that these proceedings are not the forum in which to pursue US WEST's constitutional arguments.

The RUD-OAG stated that there is no evidence to support US WEST's contention that residential service is priced below cost.

c. Commission Action

The Federal Act at § 251(c)(4)(A) requires an incumbent LEC to "offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." The FCC Interconnection Order at Paragraph 939 (which is unstayed) declared that resale restrictions or limitations are "presumptively unreasonable."

US WEST has offered no record evidence to support its proposed exemption of residential service from the wholesale resale obligation. US WEST's assertion that residential rates are priced below cost is without record support and opposed by the parties, including the RUD-OAG. US WEST's proposal to impose a discount rate of zero does not cure the error--it amounts to a request to remove residential rates from the wholesale rate obligation. US WEST must offer its residential service at the wholesale discount rate. The Commission reaffirms this portion of its December 2 Arbitration Order.

6. Avoided Cost Studies

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission adopted the avoided cost discount rate of 21.5 percent proposed by MCImetro for the AT&T/US WEST and MCImetro/ US WEST contracts. For the MFS/US WEST contract, the Commission adopted the 21.5 percent avoided cost discount presented in the Joint Position Statement of MFS and US WEST.

b. The Requests for Reconsideration and Clarification

US WEST asked for reconsideration and the Department asked for clarification of this issue.

US WEST asked the Commission upon reconsideration to reject MCImetro's proposed avoided cost study and adopt US WEST's. US WEST restated its original arguments that its cost studies are accurate and the cost studies supported by MCImetro and AT&T are fatally flawed.

MCImetro argued that US WEST was simply repeating its original criticisms of MCImetro's avoided cost study. Even if US WEST's suggested changes to MCImetro's data were accepted, MCImetro stated, the results would be insignificant.

AT&T stated that US WEST's avoided cost studies were so fundamentally flawed that they would effectively eliminate resale as a commercially viable means of providing local service, pending the development of facilities-based competition.

The Department stated that the Commission's decision on avoided cost studies can be interpreted in two ways: 1) MCImetro's discount rate differs from the Department's rate *both* because MCImetro's rate takes into account the return on avoided retail assets and associated taxes *and* because MCImetro's rate keeps US WEST's profit margins the same at wholesale as at retail; or 2) the difference between MCImetro's discount rate and the rate advanced by the Department arises *only* because the former takes into account the return on avoided retail assets and associated taxes and the Department's rate does not. According to the Department, only the first interpretation is correct. The Department asked the Commission to clarify its Order accordingly.

MCImetro responded that the Department's request for clarification is based on a misinterpretation of the Commission's Order. As one means of cross-checking the validity of MCImetro's formula, the Commission noted that MCImetro's discount formula resulted in a wholesale rate profit margin that was equal to US WEST's margin at retail. The Commission did not use this fact as a separate calculation factor in arriving at its avoided cost determination. MCImetro stated that the Department's suggested "clarification" is inaccurate and unnecessary.

AT&T stated that evidence was not directed at the hearing to examine all the factors that caused the difference between MCImetro's and the Department's formula results. The Commission should not adopt the Department's suggested clarification, which reduces the differences to two factors. Further, MCImetro introduced the wholesale/retail margin parity as a result of its study, not a factor in the calculation.

c. Commission Action

In the consolidated arbitration proceeding, the Commission carefully studied the avoided cost studies presented by US WEST, AT&T, and MCImetro, the recommendations of the ALJs, and the expert testimony presented by the Department and the RUD-OAG. After careful analysis, the Commission concluded that MCImetro's avoided cost study was the most logical, reasonable, and consistent with FCC principles and guidance. The Commission adopted MCImetro's cost study, without the adjustment recommended by the Department.

Upon reconsideration, the Commission has again reviewed these studies in light of the parties' written comments and critiques. The Commission continues to find that MCImetro's cost study presents the best means of constructing just and reasonable wholesale rates for US WEST. The Commission will deny US WEST's request for reconsideration of the avoided cost discount.

Neither will the Commission grant the Department's request for clarification. The Commission's Order noted the fact that MCImetro's avoided cost formula resulted in a profit margin equal to US WEST's margin at retail. The Order clearly used this fact as a demonstration of the reasonableness of MCImetro's formula, not as a factor to be calculated into the formula. The Department's requested clarification is inaccurate and unnecessary. The Commission will deny it.

7. Deposits

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that US WEST had met its burden of showing that a deposit requirement is a reasonable means of preventing credit problems and does not constitute an unreasonable barrier to entry. The Commission required AT&T and MCImetro to make suitable deposits with US WEST as a guarantee of the payment of resale charges.

b. The Request for Reconsideration

AT&T asked the Commission to reconsider the requirement that AT&T make a security deposit with US WEST. AT&T stated that US WEST has failed to establish that AT&T poses any actual credit risk to US WEST.

US WEST responded that the "pick and choose" language of the Commission-approved contract renders AT&T's argument regarding creditworthiness irrelevant. If no deposit is required in the AT&T contract, other CLECs will be able to delete any such provision from their own contracts under the pick and choose process. Other CLECs may pose significant credit risks to US WEST.

c. Commission Action

The Commission finds that AT&T has failed to introduce any new fact or argument to persuade the Commission to reconsider this issue. The Commission continues to find that

US WEST's deposit requirement is a reasonable means for the Company to prevent credit problems as it opens its network to competitors. The Commission reaffirms this portion of its December 2 Arbitration Order.

8. Construction Charges

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that US WEST has a right to recover its excess costs when a CLEC asks US WEST to build a facility in an area not yet served, or to provide more facility than US WEST would provide its own customers, or when an end-user requests a service which would necessitate either scenario. At p. 36 of the Order, the Commission continued:

> In such a case, US WEST will be allowed to recover its economically efficient charges, over and above those normally incurred in serving its own customers, that are requested by a reseller for the benefit of the reseller's customers. The recovery will be limited to charges that are not already recovered in prices charged (to avoid double recovery) and to the level of benefit experienced by the requesting CLEC. If benefits of the construction will be shared among the requesting CLEC, US WEST, and their respective customers, US WEST's recovery will be limited to a percentage share of the charges, based on a reasonable estimate of the CLEC's proportionate share of the benefit.

b. The Requests for Reconsideration

Both MFS and the Department asked for reconsideration of this issue.

MFS stated that the burden of proof is on US WEST. US WEST has not shown that it is *not* already recovering construction charges along with its other incremental costs; the Commission should therefore not impose separate construction charges.

The Department asked the Commission to clarify its Order on construction charges (as well as on facilities modification and operational support systems) in two regards: 1) how such costs are to be measured; and 2) how the costs are to be recovered.

The Department asked the Commission to find that construction charges should be measured according to TELRIC principles, just as costs of unbundled elements are measured. The Department asked the Commission to clarify that when it allowed US WEST to recover its reasonable costs "based on economically efficient construction charges" it meant that TELRIC-based prices would be used.

The Department asked the Commission to apply three basic principles in determining how US WEST will recover construction costs: 1) all beneficiaries of infrastructure development must share in the costs of development to the extent of their benefit; 2) the incumbent is very likely to benefit from such expenditures, along with new entrants; and 3) the relevant beneficiaries are those who will benefit from these expenditures over the useful lives of the improvements, not just the parties that requested the improvements.

According to the Department, the Commission applied the first two cost recovery principles in its decision on construction charges, but not the third. The Department asked the Commission to clarify that it meant US WEST to recover the costs of new construction from relevant beneficiaries over the useful lives of the improvements.

US WEST argued that costs of building to serve new entrants are real, extraordinary costs that US WEST would not incur in ordinary circumstances; they are not TELRIC costs in any sense of the term. US WEST stated that the construction costs it seeks to recover are the same sort of out-of-pocket construction costs that it currently collects from its own end-user customers when service requires facilities build-out. If US WEST were responsible for up-front costs of facilities construction, customers would turn to CLECs for their service, since the CLECs would not need to add the extra charges to their rates.

US WEST stated that cost recovery should not be spread over the lives of the equipment. US WEST does not have the resources to capitalize the entry of resellers into the market and should not be required to assume the risks of their competitive entry.

c. Commission Action

The Commission will first address US WEST's recovery of its construction charges, then the method of measuring US WEST's construction costs.

Method of Recovery. The Department asked the Commission to clarify that US WEST's construction costs must be recovered from all parties who will benefit from the expenditures over the useful lives of the improvements. The requested clarification is consistent with the Arbitration Order, in which the Commission stated that US WEST's recovery would be limited to a percentage share of the charges, "based on a reasonable estimate of the CLEC's proportionate share of the benefit." Order at p. 36. Because CLECs other than the requestor may well share in the benefits from the improvement, the recovery should be extended over the facilities' useful lives.

The Commission understands that there will be a number of ways to calculate this recovery methodology. Parties are free to negotiate and develop a mutually agreeable method, so long as it is consistent with the Commission's principle as clarified.

The Commission clarifies its December 2 Arbitration Order as follows: If benefits of construction will be shared among the requesting CLEC, US WEST, and potentially other CLECs, US WEST's recovery will be limited to a percentage share of the charges, based on a reasonable estimate of the benefits each party will receive.

Measurement of Costs. The Department also asked the Commission to clarify that US WEST's costs of construction will be recovered through TELRIC-based prices. In a related request, MFS asked the Commission to, in effect, presume that US WEST's construction costs are already being recovered through incremental costs.

The Commission will deny the Department's and MFS's requests for clarification of this issue. Upon reconsideration, it is clear that the method of measuring US WEST's construction costs should be referred for consideration in the generic cost proceeding already initiated. Docket

No. P-442,5321,3167,466,421/CI-96-1540. In that investigation, all parties will be able to address such issues as the nature of the costs (that is, one-time versus incremental), and whether or not the costs are included in current cost studies or should be developed in cost studies that are investigated in the generic proceeding. US WEST will be able to raise its concern regarding the potential rate anomaly between US WEST's charges to its own end-users for facilities build-out and rates charged by CLECs for similar circumstances.

The Commission denies the petitions for reconsideration filed by the Department and MFS on this issue. The Commission refers the consideration of the measurement of US WEST's costs of construction to the generic cost proceeding.

E. Electronic Interfaces

1. Operational Interfaces Required of US WEST

a. The Arbitration Order

In the December 2 Arbitration Order, the Commission found that US WEST must comply with AT&T's proposed interface standards, pending adoption of national standards. The Commission required US WEST to file monthly progress reports on the availability of required interfaces. US WEST must file the monthly reports with the Commission starting January 1, 1997, and every month thereafter until US WEST has made available every interface required by the FCC.

b. The Request for Reconsideration

US WEST asked the Commission to relieve the Company of the requirement to develop AT&T's proposed interim standards and to allow US WEST to pursue its own website systems access proposal. US WEST stated that its own Mediation Gateway system may meet the needs of other CLECs while US WEST, AT&T and MCI continue to negotiate regarding the development of operational interfaces. According to US WEST, its system will create access software which will be reused in any standard-based gateway solutions. US WEST also stated that the interface standards adopted by the Commission will not be ready by January 1, 1997.

AT&T replied that the Commission had properly rejected US WEST's website interface proposal as inconsistent with the FCC Interconnection Order and with the developing national standards. Neither US WEST's hopes for a negotiated solution nor the fact that the required interfaces will not be available by January 1, 1997 is relevant.

c. Commission Action

The Commission finds that US WEST has presented no new fact or argument to prompt reconsideration of this issue. The Commission denies US WEST reconsideration of this issue. For the reasons stated in the Arbitration Order, the Commission reaffirms that it requires US WEST to comply with AT&T's proposed interface standards, pending adoption of national standards.

2. Format for Billing

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission required US WEST to transmit billing information in Billing Output Specification (BOS) format through the Integrated Access Billing System (IABS).

b. The Request for Reconsideration

US WEST asked the Commission to reconsider its decision and allow US WEST to use its proposed Customer Record Information System (CRIS) method of billing local services. US WEST offered the following reasons the Commission should adopt US WEST's proposal upon reconsideration: CRIS is a standard system that meets specifications common to the seven RBOCs; two RBOCs are currently using IABS for CLEC billing, while the other five reportedly plan to use CRIS; BOS is currently only used for interexchange carriers in the telephone industry; AT&T and MCImetro currently use the electronic data interexchange associated with CRIS for their own local accounts.

AT&T replied that the non-standard nature of the CRIS billing system is fully demonstrated by record evidence. The evidence further shows that US WEST's existing IABS method is a standard, nationally recognized carrier-to-carrier billing system that currently serves as an interface between AT&T and US WEST. The CRIS billing approach, on the other hand, is a non-uniform system which will create additional costs for new entrants and should be rejected.

c. Commission Action

The Commission reaffirms its decision to require US WEST to transmit billing information in BOS format through IABS. The fact that US WEST's IABS is an existing interface between AT&T and US WEST is a point in its favor. US WEST itself states that two RBOCs are "reported" to be using IABS for CLEC billing. On the other hand, US WEST's statement that the other five RBOCs "reportedly plan to use CRIS" is too speculative to be helpful.

Upon reconsideration, the Commission finds that requiring US WEST to transmit billing information in BOS format through IABS is a reasonable approach. The Commission will reaffirm this portion of the Arbitration Order.

3. Pricing of Operational Support Systems

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission adopted the Department's position regarding US WEST's costs of providing access to operational support systems. The Commission adopted the following contract language proposed by the Department:

> With respect to interface costs, the Commission will project the demand for particular interfaces over the lives of the facilities and allocate their costs among all future users. US WEST must develop such interfaces as are reasonably necessary for efficient operations.

When US WEST has documented, economically efficient costs available, it must file with the Commission its proposed pricing for use of the interface.

b. The Request for Reconsideration

Both US WEST and the Department asked the Commission to reconsider this issue.

US WEST stated that the Arbitration Order fails to ensure the Company full recovery of its costs of creating and operating operations systems interfaces on behalf of competitors. US WEST asked the Commission to reconsider its Order and ensure the Company dollar for dollar, up-front recovery of systems costs incurred for competitors.

The Department asked the Commission to consider the costs of developing systems interfaces in a manner consistent with the Department's recommendation on construction charges. The Department therefore asked the Commission to find that costs of developing operations systems interfaces will be measured according to TELRIC principles. The Department also asked the Commission to establish the three cost recovery principles the Department proposed in its comments on construction charges.

The Department asked the Commission to implement the Department's proposals regarding cost measurement and cost recovery by adopting the following language:

> With respect to interface costs, the Commission will project the demand for particular interfaces over the lives of the facilities and establish prices for each interface based on TELRIC costs plus a reasonable contribution from all future beneficiaries of each interface, including US WEST if the company benefits from an interface. US WEST must develop such interfaces as are reasonably necessary for efficient operations.

c. Commission Action

Upon reconsideration, the Commission will adopt the Department's clarification regarding the measurement and recovery of US WEST's costs of providing access to operational support systems. The Commission agrees with the Department that its proposed language better captures the concept of shared benefits in determining cost recovery. The Commission also agrees with the Department that the costs are normal costs of service, for which prices should be established on a TELRIC basis. US WEST's request for dollar-for-dollar, up-front recovery is inconsistent with the basic pricing and recovery strategy upon which competitive service will be based.

The Commission is aware that the Department had made a parallel request for resale construction costs to be measured based on TELRIC costs. The Commission deferred consideration of the measurement of construction costs to the generic cost proceeding for more factual exploration of issues such as the possible rate anomaly between US WEST's charges to its own end-users for facilities build-out and rates charged by CLECs for similar circumstances. See Section IV(D)(8) above. In the generic cost proceeding, the parties can discuss if TELRIC-priced cost recovery would properly compensate US WEST for construction charges, given the particular circumstances of those costs. In contrast, costs of

access to operational support systems do not present particular cost anomalies; the Commission feels comfortable establishing a methodology for measuring these costs. The Commission therefore need not refer to the generic cost proceeding its consideration of the measurement of the costs of providing access to operational support systems.

F. Number Portability

1. Interim Number Portability

a. The Arbitration Order

In the December 2, 1996 Arbitration Order, the Commission found that US WEST, AT&T, and MCImetro had reached agreement on the methods for implementing interim number portability. The parties had signed a joint agreement for withdrawal and modification of arbitration issues regarding interim number portability. The Commission found that the joint agreement was entered into the record as Exhibit 22.

The ALJ Panel recommended adoption of AT&T Attachment 9 to reflect the joint agreement. In exceptions, US WEST asserted that Attachment 9 did not correctly track the language of Exhibit 22 in all respects. The Commission agreed with US WEST and adopted Joint Exhibit 22, not AT&T Attachment 9, to reflect the parties' joint agreement on methods for implementing interim number portability.

b. The Request for Reconsideration

AT&T stated that the parties' stipulated provisions regarding interim number portability are all contained within AT&T's Attachment 9. According to AT&T, Attachment 9 also resolves a few additional issues regarding interim number portability and many issues concerning permanent number portability.

AT&T noted that the Commission adopted AT&T's proposed contract, except as modified or otherwise specified in the Arbitration Order, for purposes of AT&T's arbitrated agreements with AT&T and MCImetro.

For these reasons, AT&T asked the Commission to amend the Arbitration Order to adopt AT&T's Attachment 9.

US WEST claimed that AT&T had modified, deleted, or added language in Attachment 9, causing the Attachment to differ in significant respects from the parties' Joint Exhibit 22. US WEST listed specific examples to illustrate its point. US WEST argued that the additional issues concerning interim and permanent number portability in Attachment 9 had not been identified in any respect in Joint Exhibit 22. US WEST asked the Commission to continue to reject AT&T's Attachment 9 as a basis for resolving number portability issues.

The Department urged the Commission to adopt AT&T's Attachment 9. The Department stated that the additional issues covered in this document, such as white and yellow page listings, porting numbers, and billing, must be spelled out in the contract in order to facilitate a smooth transition to competition.

c. Commission Action

Upon reconsideration, the Commission continues to believe that Exhibit 22, which was submitted jointly by US WEST, AT&T, and MCImetro, adequately addresses the issues relevant to interim number portability. Most of the issues added by AT&T to its Attachment 9 concern permanent number portability. The Commission has referred all permanent number portability issues to the regional industry effort to implement a permanent number portability system. Resolution of these issues with contract language is not only unnecessary at this time, but might also conflict with the regional effort now underway.

The Commission denies AT&T's request for reconsideration of this issue.

2. Recovery of Costs for Interim Number Portability

a. The Arbitration Order

In the Arbitration Order, the Commission adopted a bill and keep method for interim number portability costs for AT&T, MCImetro, and US WEST. For intrastate terminating access charges for ported numbers, the Commission adopted a cost recovery method analogous to the FCC's cost recovery method for interstate terminating access charges. The Commission's adopted cost allocation method was described by the ALJ Panel as follows:

> The terminating carrier shall receive the CCL charge, end office charges (primarily the local switching charge), the transport interconnection charge, and some portion of the tandem switched transport element, depending on the distance from switch to switch. The tandem switching carrier shall receive the balance of the tandem switched transport element and all of the tandem switching and entrance facility charges.

Finally, the Commission noted that MFS and US WEST had reached a mutually acceptable method of cost recovery and cost allocation in these issues. The Commission adopted MFS's proposed language in the joint MFS/US WEST agreement.

b. The Request for Reconsideration and Request for Clarification

US WEST stated that the FCC Number Portability Order, to which the Commission's cost recovery finding conforms, is a serious violation of US WEST's rights and must be rejected. US WEST stated that it is seeking federal appellate court review of the FCC's Order and is also seeking redress in the U.S. Court of Federal Claims. Pending resolution of those actions, US WEST asked the Commission to find that costs of interim number portability should be borne by the cost causer--the new entrants--not by US WEST in a manner that handicaps the Company competitively. US WEST asked the Commission to reconsider the Arbitration Order and allow US WEST to retain the local switching and local transport charges it receives from interexchange carriers when calls are forwarded to a CLEC as a result of interim number portability.

AT&T, MCImetro, and MFS responded that the Commission is not free to ignore a standing FCC Order. US WEST must seek redress in the judicial avenues open to it--the Eighth Circuit Court of Appeals and the U.S. Court of Claims.

MFS asked the Commission to clarify the Arbitration Order regarding the resolution of interim number portability issues between MFS and US WEST. The Arbitration Order adopted MFS's proposed language for both method of cost recovery and allocation of switched access charges. MFS asked the Commission to clarify that MFS's position on the method of recovery of interim number portability costs (Exhibit 62, p. 37) represents a compromise of MFS's position on this issue for purposes of the interconnection agreement. The proposed language did not represent a method which was "mutually agreeable" with US WEST, as stated in the Order.

c. Commission Action

Contrary to US WEST's assertions, the Commission is not free to choose which provisions of the FCC Orders governing interconnection and number portability it will follow. The unstayed portions of the FCC Interconnection Order and the entire FCC Number Portability Order are binding upon the Commission. All parties agree that the Commission's resolution of the issues of interim number portability cost recovery in the Arbitration Order is consistent with the FCC's disposition of these issues in the Number Portability Order. The Commission will therefore reaffirm its decision on this issue.

The Commission agrees with MFS that adoption of its requested clarification will better reflect the positions of the parties in the negotiations. The Commission will adopt MFS's proposed clarification of the Arbitration Order.

G. Access to Rights of Way

1. Scope of Access and Reciprocity

a. The Arbitration Order

In the December 2, 1996 Order, the Commission noted that the Federal Act's amendments of the Telecommunications Act of 1934 establish that the FCC will prescribe regulations to carry out pole attachment law.

The FCC Interconnection Order at Paragraph 1119 states that the right to place pole attachments is not reciprocal between ILECs and CLECs. The duty to allow pole attachment flows from the incumbent to the new entrant.

The Commission adopted AT&T's proposed contract provision on pole attachments, which the Commission found properly reflected the FCC language on reciprocity. The Commission also found that the proposed language appropriately requires US WEST to provide equal and nondiscriminatory access to rights of way for AT&T and MCImetro, under terms and conditions as favorable as US WEST would provide itself.

b. The Request for Reconsideration

US WEST asked the Commission to find that it erred by adopting AT&T's proposed contract language. US WEST stated that AT&T's language goes beyond the subject of this issue; Commission acceptance of the language would be overbroad, arbitrary, and capricious. US WEST asked the Commission to adopt the ALJ Panel's recommended language, which

would establish reciprocal access duties.

AT&T responded that US WEST characterizes the adoption of the AT&T language as "overbroad" without identifying the specific language or provision to which it refers. AT&T contrasted its detailed and specific contract terms with US WEST's extremely general, one-sentence provision. Moreover, that one sentence is incorrect, since it purports to create reciprocal duties.

MCImetro stated that US WEST's proposal is clearly in conflict with the Act and the FCC Interconnection Rules.

c. Commission Action

The Federal Act clearly conferred upon the FCC the right to regulate pole attachments.[7] The FCC Interconnection Order established that the duty to allow pole attachment flows from the incumbent to the new entrant. The Commission declines US WEST's request to adopt the Panel's language, which would confer reciprocal obligations to allow pole attachment.

The Commission also notes that US WEST's characterization of AT&T's language as "overbroad" is itself overbroad and nonspecific. US WEST has failed to specifically "indicate the basis for the objection" to the contract language, as required by the Arbitration Order. Order at p. 78. US WEST's bare characterization of AT&T's language does not support a request for reconsideration.

The Commission reaffirms its decision on Scope of Access and Reciprocity in the Arbitration Order.

2. Licenses

a. The Arbitration Order

In the December 2, 1996 decision, the Commission adopted AT&T's proposed language requiring US WEST to offer the use of such rights of way as it has obtained from a third party to a CLEC, to the extent the right of way agreement does not preclude the extension.

b. The Request for Reconsideration

In its reconsideration petition, US WEST stated that the Commission's Order overlooks the significance of Minn. Stat. § 222.36, which gives to CLECS rights of eminent domain equal to US WEST's. US WEST asked the Commission to adopt the recommendation of the ALJ Panel, which stated as follows:

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[7] Unless a state has rules governing pole attachment in effect--not the case in Minnesota.

> The contract shall provide that the parties will cooperate in obtaining or expanding rights-of-way suitable for the foreseeable needs of all LECs. If existing easements or licenses run in favor of US WEST but not other carriers, US WEST shall use reasonable efforts to assist the new entrant in expanding the easement, as may be necessary, but the new entrant shall reimburse US WEST for its costs of providing such assistance.

AT&T responded that the language adopted by the Commission is consistent with the FCC Rules and Minnesota law of eminent domain. AT&T asked the Commission to deny US WEST's request for reconsideration of this issue.

c. Commission Action

US WEST has raised no new fact or argument to justify reconsideration of this issue. The Commission continues to find that the language adopted adequately reflects the terms of the FCC Interconnection Order regarding the extension of rights of way obtained from third parties to CLECs. The Commission reaffirms this part of its Arbitration Order.

3. Pricing and Standard Terms

a. The Arbitration Order

In the Arbitration Order, the Commission adopted AT&T's contract language on sharing the costs of maintaining rights of way, conduits, and other access means, with one modification: AT&T shall pay any increased maintenance costs for US WEST caused by AT&T's actions.

The Commission allowed US WEST to continue to charge the annual usage fee, make ready charges, labor charges, and application fees it has charged under the provisions of the 1978 Pole Attachment Act, except as modified by Section 703 of the Federal Act and by future FCC regulations. US WEST may not, however, charge minimum purchase requirements to a requesting carrier.

b. The Requests for Reconsideration

Both US WEST and AT&T asked for reconsideration of this issue.

US WEST stated that AT&T's language is overbroad. US WEST also repeated two arguments raised in the original proceeding: 1) if a governmental unit required relocation of facilities shared by AT&T and US WEST, AT&T would not share any of the expense; 2) minimum purchase requirements are necessary to avoid inefficient or disruptive use of facilities.

AT&T stated that the forward-looking maintenance costs for access to rights of way should already be included in US WEST's TELRIC rate based on a least cost, forward-looking technology. US WEST has failed to produce any cost study or other evidence to show that such charges are not covered in an appropriate TELRIC cost study; the Commission should therefore preclude the imposition of any additional charge at this time.

US WEST replied that the Commission's decision to require AT&T to fund any increased maintenance expenses associated with AT&T's actions was completely appropriate. AT&T's attempt to use the TELRIC theory to avoid costs that it causes, and to have US WEST act as its banker and underwrite those costs, is inappropriate.

c. Commission Action

US WEST has raised no new arguments for the Commission's consideration. The Commission decided in its Order that minimum purchase requirements must be rejected as a barrier to entry. The Commission also specifically noted that US WEST may pursue issues such as a governmental unit requiring relocation of shared facilities in the forthcoming FCC pole attachment rulemaking proceeding.

In response to AT&T's request for reconsideration, the Commission notes that it has initiated a generic cost proceeding to determine the permanent prices for US WEST's unbundled network elements. AT&T can raise its concerns regarding increased maintenance costs for pole attachments in the generic cost proceeding. The Commission reaffirms its decision regarding pricing and standard terms at this time.

H. Ancillary Services and Branding

1. Access to Directory Assistance Databases

a. The Arbitration Order

In the December 2, 1996 Order, the Commission found that the Act and FCC Interconnection Order require US WEST to provide unbundled access to its directory assistance database at the request of a CLEC, with costs to be recovered through TELRIC-based rates established for the service.

The Commission did not adopt the ALJs' recommendation to limit the database access requirement to a read-only basis. The Commission found that CLECs must have the same access to customer names and addresses as US WEST has, with one qualification: the database may be electronically transferred in a manner that will preclude CLECs from manipulating or changing information in the original US WEST database.

The Commission agreed with the ALJs that US WEST's imposition of volume or term requirements would constitute a barrier to entry.

b. The Requests for Reconsideration

Both US WEST and the Department asked for reconsideration of this issue.

US WEST stated that the Commission erred in rejecting the Panel's recommendation to limit access to a read-only basis. The FCC Interconnection Order does not permit the CLEC to take a copy of the incumbent's database. According to US WEST, the Commission's wide scope of access deprives US WEST of an ownership interest in its property.

AT&T replied that US WEST's access to directory assistance databases is not limited to a read-only basis; no such requirement may therefore be imposed upon AT&T. AT&T stated that it properly requested electronic transfer of the directory assistance databases so that it can self-provision directory assistance from its operator services platform. The Commission's Order will preclude AT&T or any other CLEC from manipulating or changing information in the original US WEST database.

The Department stated that it has a minor concern with the Commission's decision regarding directory assistance database access. The Commission rejected the ALJs' recommendation that CLECs be limited to read-only access and specified that CLECs should have database access on the same terms as the incumbent. If CLECs are precluded under the Order from manipulating or changing information, they must be denied the incumbent's insert, update, and delete privileges and will therefore not have access on the same terms as the incumbent. The Commission's Order is contradictory and should be clarified.

US WEST responded that the FCC Interconnection Order requires ILECs to allow CLECs database access so that the CLECs can enter their own customer information. The Commission's Order inappropriately expands that access to allow CLECs to copy US WEST's database electronically.

c. Commission Action

Paragraph 538 of the FCC Interconnection Order provides:

> ...the directory assistance database must be unbundled for access by requesting carriers. Such access must include both entry of the requesting carrier's customer information into the database, and the ability to read such database, so as to enable requesting carriers to provide operator services and directory assistance concerning incumbent LEC customer information. We clarify, however, that the entry of a competitor's customer information into an incumbent LEC's directory assistance database can be mediated by the incumbent LEC to prevent unauthorized use of the database.

Upon further study of the FCC Interconnection Order, and consideration of the parties' oral and written comments, the Commission finds that it must clarify this section of its Arbitration Order. The FCC clearly allows CLECs access into the ILEC database to enter or change their own CLEC customer information and to read the incumbent's and other CLECs' customer information. This level of database access is sufficient for CLECs to provide their own directory assistance services. CLECs need not electronically transfer the incumbent's database to obtain the necessary information, and AT&T and MCImetro will not be allowed to do so.

The Commission finds that this interpretation of the directory assistance database access issue is consistent with the FCC Order and also with an overall competitive philosophy which encourages competitive entry while maintaining the necessary protections for the incumbent.

The Commission finds that US WEST offered nothing new to support the imposition of term commitments. The Commission will deny reconsideration of this issue.

2. White and Yellow Page Listings

a. The Arbitration Order

In the Arbitration Order, the Commission accepted US WEST's proposal for white and yellow page listings, with one added requirement: the white pages directory published by US WEST Direct on behalf of US WEST must treat all local providers the same. Specifically, the Commission required the directory to allot to CLECs the same amount of space in the Customer Guide section of the white pages for CLEC-specific information as it allots to US WEST.

b. The Request for Reconsideration

US WEST asked the Commission to find that the issues of the Customer Guide section of the white pages, distribution of yellow page directories, and yellow pages advertising exceed the requirements of the Act and should not be subjects of arbitration. US WEST asked the Commission to direct CLECs to engage in direct negotiations with directory publishers on these items and related cost recovery issues.

AT&T responded that these issues were properly resolved under the arbitration proceedings. The Commission appropriately exercised its authority under § 251(b)(3) of the Federal Act and Minn. Stat. § 237.16, subds. 1(a) and 8(a)(7). Pursuant to these federal and state grants of authority, the Commission properly imposed requirements to ensure that AT&T is treated in the same fashion as US WEST.

c. Commission Action

Section 251(b)(3) of the Federal Act obliges LECs to permit CLECs nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing. The Commission's Order requires US WEST to provide CLECs the required parity of access to directories listings. As the party that contracts with US WEST Direct, US WEST must be the entity that ensures the parity. This requirement is not tantamount to placing regulatory requirements directly on US WEST Direct. The Commission's decision does not establish requirements beyond the bounds of the Federal Act and Minn. Stat. § 237.16--which require the Commission to establish equitable terms for the incumbent and new entrant.

The Commission reaffirms this section of the Arbitration Order.

I. Quality Standards

1. Selection of Quality Standards

a. The Arbitration Order

In its December 2, 1996 Order, the Commission found that terms specifying measurable service quality standards were appropriate for interconnection agreements, and that AT&T's proposed "Direct Measures of Quality" (DMOQs) represented the most reasonable list of such standards in the record of the case.

b. The Request for Reconsideration

US WEST argued that the DMOQs are unnecessary, because the Act already directs US WEST to provide comparable service to CLECs as it provides to itself or its affiliates. US WEST alleged that the DMOQs quality levels exceed the levels US WEST provides itself and its affiliates. And US WEST argued that the DMOQs are one-sided, in that they inappropriately shift business risks and costs off competitors and onto US WEST.

In its review of the January 3, 1997 contract, the Department stated that the proposed quality measures seem adequate, but that the system could be evaluated only with the benefit of experience. The Department recommended further reporting on compliance with these quality standards.

c. Commission Action

The Commission will deny US WEST's request for reconsideration. Parties have noted the importance of having measurable service standards as a means to ascertain whether US WEST provides to its competitors the same service quality that it provides to itself. While the Act may require ILECs to provide competitors with the same level of quality that it provides to itself, the Act does not contain a means to gauge compliance. This contract clause does.

US WEST's claim that the DMOQs exceed its current service quality standards fails to state grounds for granting reconsideration. The Act expressly provides for CLECs to request superior service quality. However, in the interest of clarifying this point, **the Commission will add the following language to the contract's Attachment 11, p. 1, Item 1., MCImetro/AT&T Supplier Performance Quality Management System:**

> **MCIm/AT&T must compensate US WEST for the proportionate share of the added economic costs US WEST incurs in complying whenever MCIm/AT&T request the use of facilities not currently in place or when MCIm/AT&T request services or faciliites demonstrably superior in quality to the highest quality of these three items: 1) requirements of the FCC rules; 2) requirements of Commission rules or Orders; or 3) the level of quality US WEST provides to itself or its affiliates.**

While the Commission does not share all of US WEST's concerns about the biased nature of the DMOQs, the Commission finds it appropriate to modify the provision permitting AT&T and MCImetro to alter the DMOQs unilaterally. **The Commission will replace the third and fourth sentence of Attachment 11, p. 8, Item 3.4, Changes to DMOQs, with the following:**

> **The parties shall review the DMOQs and their associated metrics and performance criteria from time to time. Changes shall become a part of this Agreement upon the mutual agreement of US WEST and [AT&T or MCImetro, as appropriate]. Service quality remains subject to the Orders and rules of the Commission, contrary provisions of the Agreement notwithstanding.**

The Commission will change some DMOQ metrics to conform to other provisions of the contract, the Commission's rules, the Commission's understanding of US WEST's current practices, and the Commission's judgment. In particular, **the Commission will modify the following metrics that occur in Attachment 11, Appendix B:**

- **Page 10: OP-1 and OP-2. Adopt a 2-day standard for completing service order installations, in conformance with the Commission's understanding of US WEST's current practices.**
- **Pages 10-11: OP-3, OP-5. Adopt a standard of fulfilling 90 percent of commitments to customers, in conformance with Minnesota Rules part 7810.2800.**
- **Pages 10-11: OP-4. Adopt the parties' agreement as embodied in Attachment 5, § 9.1.**
- **Page 11: OP-6. Adopt a standard of fulfilling 95 percent of provisioning commitments.**
- **Page 11: OP-7. Adopt a standard of not more than 10 percent incident of troubles for designed services, and 9 percent for non-designed services.**
- **Page 15: MR-1, MR-2. Reflect a standard of 95% of out-of-service reports restored within 24 hours, in conformance with Minnesota Rules part 7810.8500.**
- **Page 17: MR-7. Adopt a standard of no more that 8% missed maintenance appointments, in conformance with the Commission's understanding of US WEST's current practices.**

In addition, the Commission finds some merit to the allegation that certain standards lack sufficient basis in the record. Therefore, **the Commission will remove from the contract the following DMOQs, as they appear in Appendix 11, Appendix B:**

Pages 7-8, Pre-Order DMOQs, all metrics
Pages 10-13, Order/Provisioning DMOQs, metrics 10, 11, 13, 14 and 15
Pages 15-18, Maintenance/Repair DMOQs, metrics 3, 5, 6, 8, 9, 10, 12 and 13
Pages 20-23, Billing DMOQs, metrics 1, 2, 3, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18 and 19
Pages 27-28, Directory Assistance DMOQs, metrics 2, 3, 4 and 5
Pages 30-33, Network Performance DMOQs, metrics 1, 2, 4, 5, 6, 7 and 8
Pages 35-38, Interconnection/Unbundled Elements/Combinations Performance DMOQs, metrics 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11

With the foregoing changes, the Commission finds the record sufficient to approve implementation of DMOQs. However, the Commission finds that the Department's remarks are well taken, and that this matter warrants further Commission attention. The Commission notes that --

- some of the actual measures were not included in the submitted DMOQs -- specifically, measures relating to Operator Services and Interconnect/Unbundled Elements & Combinations;
- some of the Network Performance DMOQs appear to be dependent on the Operations Support Systems which are yet to be finalized;
- some of the DMOQs could not be compared to existing rules or the service quality stipulated requirements because they are not tied to consumer service requirements; and

- the Commission has had inadequate opportunity to analyze the approximately 16 measures that US WEST purports to use for gauging its service quality.

Therefore, the Commission will initiate a proceeding to further address the service quality standards to be used by US WEST for interconnection, resale and the purchase of unbundled elements with AT&T and MCImetro. The Commission invites interested parties to file, within 30 days of the date of this Order, proposed measurable service quality standards that they believe to be necessary regarding US WEST's relations with AT&T and MCImetro. The Commission further invites interested parties in the current docket to file, within 30 days thereafter, responses to the proposals, including a statement supporting or opposing each measurement, and the standard proposed for that measurement.

2. Performance Penalties

a. The Arbitration Order

In its December 2, 1996 Order, the Commission adopted performance credits to give meaningful effect to the quality standards in the contract. The Commission found that US WEST's proposed contract was too vague and left enforcement of the contract's quality standards entirely to individual complaint or enforcement proceedings without any clear guidance on how damages would be calculated or assessed. Clarification on this point would create an appropriate disincentive for an incumbent telephone company to provide substandard service to competitors as a means of resisting and delaying competition.

b. The Request for Reconsideration

US WEST conceded that its proposed contract had no penalty provisions for non-compliance. However, US WEST raised a number of arguments, both general and specific, for reconsideration.

In general, US WEST argued that neither the Act, nor relevant FCC regulations, nor Commission statutes and rules authorize the Commission to include a penalties provision in an interconnection agreement. While courts will enforce stipulated damage provisions under some circumstances, those circumstances do not arise in this case. US WEST should be subject to the same service quality provisions as other LECs; if the Commission desires to revise its standards, it must conduct a rulemaking.

In specific, US WEST alleged that certain performance standards lack a sufficient basis in the record, and that other standards conflict with provisions in the body of the contract. US WEST disputed the need for, among other things, the $25,000 credit that it would have to grant to AT&T and MCImetro after every compliance failing, pursuant to Attachment 11, Appendix A, pp. 1-2, Per Occurrence Credits.

US WEST also disputed the merits of evaluating US WEST's performance based on an aggregation of performance measures, pursuant to Attachment 11, Appendix B, pp. 1-2, Overall Performance Index, Credits and Measurements.

c. Commission Action

The Commission will deny US WEST's request for reconsideration, to the extent that US WEST requests removing all incentive provisions from the contract. The record reflects the necessity of having incentives for US WEST to meet performance standards. The Commission has heard and addressed US WEST's general arguments in the December 2, 1996 Order, and has nothing to add.

However, as the Commission noted above in its discussion of service quality standards, these matters warrant further Commission attention. Therefore, the Commission will expand the scope of the proceeding described in its discussion of service quality standards to address the appropriate incentive mechanisms and levels to encourage compliance with service quality standards. The Commission invites interested parties to file, within 30 days of the date of this Order, proposed incentive mechanisms and levels appropriate to US WEST's relations with AT&T and MCImetro. The Commission further invites interested parties in the current docket to file, within 30 days thereafter, responses to the proposals, including a statement supporting or opposing each mechanism, and the level proposed for that mechanism.

Regarding US WEST's concerns about the contract's Per Occurrence Credits, the Commission acknowledges the need for incentives to comply, but regards a credit of $2,500 as more reasonable than $25,000. Therefore, **the Commission will modify Attachment 11, Appendix A, pp. 1-2, Per Occurrence Credits to reflect a credit of $2,500 per occurrence rather than $25,000 per occurrence**. At this time, the Commission will not alter the contract's provisions for evaluating US WEST's aggregate performance pursuant to Attachment 11, Appendix B, pp. 1-2, Overall Performance Index, Credits and Measurements. The Commission may, however, reconsider both of these appendices in the subsequent proceeding.

Finally, the Commission will modify the list of DMOQs appearing at Attachment 11, Appendix B, pp. 3-5, Summary of Performance Index DMOQs to reflect the decisions made in this Order regarding the individual DMOQs.

With the foregoing changes, the Commission finds the record sufficient to approve implementation of the performance incentive provisions.

J. Dispute Resolution

1. Should the ADR Process Include a "Loser Pays" Provision?

a. The Arbitration Order

In its December 2, 1996 Order, the Commission approved a dispute resolution process that required each party to a dispute to bear an equal portion of the arbitrator's fees and expenses directly related to the proceeding. The Commission considered AT&T's proposal to adopt a "loser pays" provision -- whereby a party that lost an arbitration on the merits would have to pay the costs of the arbitration -- but rejected the proposal as an inappropriate disincentive to using arbitration.

b. The Request for Reconsideration

AT&T asked the Commission to reconsider its allocation of arbitration costs. AT&T argues that a loser pays provision would discourage arbitrations, thereby discouraging any party from using arbitration as a delaying tactic. AT&T downplayed the impact of a loser pays provision by noting that the clause would only be implemented during a formal arbitration, and only when one side was entirely defeated on the merits. In the event that the parties each won some substantive issues, the arbitrator would allocate his or her costs among the parties. In the event the matter was resolved through negotiation, all parties would bear their own costs.

In the alternative, if the Commission could not accept a loser pays provision, AT&T advocated giving an arbitrator the discretion to allocate arbitration costs as he or she deemed appropriate.

c. Commission Action

The Commission declines to reconsider its position on the loser pays clause. The Commission heard and rejected these arguments previously. The Commission continues to hold that when it appoints an expert or facilitator to assist in the decision-making process, the disputing parties should bear the costs equally. To the extent that a party incurred additional costs in preparing for or pursuing an arbitration, that party would bear its own costs.

K. Pricing for Unbundled Elements, Interconnection, and Collocation

1. Network Element Pricing

a. The Arbitration Order

The Act permits telephone companies to provide service to customers by 1) using their own facilities; 2) leasing another telephone company's facilities at Commission-approved, cost-based rates; 3) reselling services purchased from another telephone company at Commission-approved, cost-based rates; or 4) some combination thereof. Sections 252 and 253 of the Act give competitors the discretion to lease only the desired elements of the telephone network, rather than having to lease some bundle of desired and undesired elements packaged together. The Act provides directions for how state commissions must determine the costs for these so-called “unbundled” network elements.

The parties to the Consolidated Arbitration presented complex models for determining the costs of these unbundled network elements. In its December 2, 1996 Order, the Commission selected the Hatfield model as the best costing model, given the constraints of the statutory time limit and the evidence in the record. The Commission also declared the rates that resulted from the Consolidated Arbitration to be interim rates, subject to refund pending the outcome of a new proceeding to consider additional evidence on the determination of unbundled network element costs. See, the US WEST Generic Cost Proceeding. In this manner, the Commission endeavored to: 1) comply with the time constraints of the Act; 2) establish a forum for giving additional consideration to certain issues in this docket; and 3) protect the business interests of all the parties as much as possible.

b. The Request for Reconsideration

US WEST asked the Commission to reconsider its choice of the Hatfield model. US WEST cited a number of assumptions contained within the model that it disputes. US WEST alleged that the Commission attached more credence to the Hatfield model than the model warranted, and that the Commission acknowledged no shortcomings of the model.

US WEST also observed that, when the Commission compared one of the results of US WEST's model -- loop costs -- to the costs adopted by other state commissions, it selected a biased sample of decisions for comparison. US WEST offered a list of loop costs adopted in other jurisdictions that are higher than the ones the Commission had considered in the Consolidated Arbitration Order.

US WEST complained that AT&T and MCImetro failed to provide US WEST with a list of prices generated by their model, the Hatfield model, until it was too late for US WEST to comment.

Finally, US WEST alleged that it would suffer irreparable harm as a result of the Consolidated Arbitration's rates, and that refunds that might follow the US WEST Generic Cost Proceeding would fail to materialize and would otherwise fail to compensate US WEST for its loss.

c. Commission Action

The Commission will decline to reconsider its Consolidated Arbitration Order with respect to this issue. The Commission considered many of these arguments in the context of that Order, and rejected them.

US WEST criticizes various assumptions within the Hatfield model. While those individual criticisms make the Hatfield model less appealing, they reflect the fact that the Hatfield model's assumptions are available to be criticized -- a fact that makes the model more appealing, especially when contrasted with the alternatives. US WEST does not quantify the consequences of the errors it cites; as a result, the Commission cannot determine their practical impact. The Commission will defer consideration of these objections to the US WEST Generic Cost Proceeding.

US WEST's emphasis on the Hatfield model's shortcomings, even if accurate, fail to address 1) the shortcomings of its own costing model, and 2) the fact that US WEST bears the burden of proof. The shortcomings of US WEST's costing model include --

- the inscrutable "black box" nature of the model, which impedes analysis and verification;
- arbitrary allocations of common costs to network elements;
- its own dubious assumptions, such as short lives for capital plant, a high cost of capital, and low "fill factors" for estimating unused capacity;
- a lack of consistency, in that US WEST's estimate of loop cost -- the single largest cost component in the network -- increased by more than 100 percent within the span of approximately one year; and
- the extreme results.

Related to this last point, the Commission has heard a variety of loop cost estimates from a variety of sources:

Loop cost of Regional Bell Operating Companies in	
Michigan	$10.03
Iowa	$12.58
Oregon	$12.58
Oregon	$12.45
Florida	$17.00
Colorado	$18.00
FCC proxy rate ceiling for Minnesota	$14.81
Positions of the parties in this case	
AT&T/MCImetro position	*$12.03*
OAG/RUD position	*$14.58*
The Department's position	*$14.81*
US WEST's estimate in 1995	*$17.18*
US WEST position	***$38.58***

In its defense, US WEST alleges to have evidence of the following loop cost findings:

Arizona	$21.75
Utah	$22.97
Nebraska	$22.97 (approximate)
Colorado	$18.00
Oregon	$17.20

Apparently, no state has adopted a loop cost equal to even *60 percent* of US WEST's request.[8] This fact bolsters the Commission's confidence in its rejection of US WEST's costing model in this docket.

US WEST suggested that AT&T's and MCImetro's failure to produce price lists earlier in the proceeding deprived US WEST of due process. US WEST failed to make its allegations with sufficient specificity to permit evaluation. In particular, US WEST failed to allege that the parties had an obligation to present such lists at some earlier point in the proceeding. US WEST failed to allege the harm it suffered as a result, and the evidence and arguments it would have marshaled had it but known of AT&T's and MCI's price lists. Finally, US WEST failed to raise this argument at the time, suggesting it did not then appear to rise to the level of a due process violation.

As noted above, US WEST alleged that the harm it expects as a result of the Consolidated

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[8] Ironically, US WEST objects to the Commission's claim that a loop price of $12.03 approximates the FCC's proxy rate of $14.81, arguing that a difference of 23 percent is significant. Given that US WEST asks this Commission to adopt a loop cost *160 percent* above the FCC's *ceiling*, the Commission does not find this argument compelling.

Arbitration's rates will be irreversible. Competitors would take advantage of the low interim rates to offer low-cost service and cut into US WEST's market share; once customers leave US WEST, US WEST would be unable to induce them to return. US WEST suggested that its revenues would decline to 50 percent of 1995 levels. At the same time, US WEST's expenses would increase due to the need to comply with new FCC and Commission orders, and with the DMOQs. And, after the US WEST Generic Cost Proceeding reveals that rates should be higher, many competitors would disappear, making refund recovery impossible.

US WEST's scenario appears to rest on one or more of the following assumptions: 1) The US WEST Generic Cost Proceeding order will be substantially delayed beyond its scheduled December 19 due date. 2) That proceeding will result in substantially higher rates than the present docket prescribes. 3) AT&T, MCImetro and MFS will be judgment-proof after December 19. 4) Smaller competitors will be willing to incur the cost of launching a business and investing in a publicity campaign to compete with US WEST, AT&T, MCImetro and MFS to provide local service; they will achieve significant market share by December 19; and then they will be willing to abandon the state less than one year later when the rates for network elements rise. 5) Customers that can be induced to switch away from US WEST by promises of lower prices during the interim period would not be induced to switch back to US WEST by price hikes following the interim period. 6) The market for local telephone service is fixed, and will not expand due to competition. The record contains insufficient evidence to support these assumptions.

Moreover, even if there is merit in US WEST's concerns, the Commission must also weigh the irreparable harm arising from delay or undue burden on competition in US WEST's service area. Setting rates too high, or delaying setting rates altogether, would burden or postpone competitors entering the local telecommunications market. Every day competition is delayed is a day of lost business opportunity for competitors. Every day competition is delayed is a day of lost opportunity for consumers to receive lower prices, broader choices and the new telecommunications technologies that competition is expected to bring to consumers. Every day competition is delayed undermines the mandates of federal and state policymakers to introduce competition to local phone markets promptly.

The Commission does not see how the increase in US WEST's expenses is related to the Commission's choice of costing model. As a result, the Commission will decline to address that argument here.

In sum, the Commission would gladly adopt a perfect costing model, if it knew of one. In lieu thereof, the Commission must do the best it can with the evidence in the record. US WEST's petition for reconsideration of this issue will be denied.

2. Geographic Deaveraging

a. The Arbitration Order

The cost of providing some elements of telephone service may vary from place to place within US WEST's system -- especially between urban and rural places. Someone who calculates the cost for an element without addressing cost changes between locations effectively generates an average cost for that element. Someone who generates multiple costs for an element,

reflecting cost changes between locations, effectively generates "deaveraged" costs. The Commission's December 2, 1996 Order did not require that rates for unbundled network elements be based on deaveraged costs.

b. The Request for Reconsideration

MFS asked the Commission to direct the parties to develop rates based on geographically-deaveraged costs. MFS argued that the Act requires cost-based pricing, and that deaveraged rates would better reflect cost. MFS acknowledged that deaveraged rates would have implications for competition and for service in high-cost areas, but argues that the Act precludes consideration of such matters.

c. Commission Action

The Commission will affirm its previous decision, and decline to impose geographic deaveraging in this docket. This position is entirely consistent with the Act. While the Act does direct this Commission to set rates based on cost, the concept of "cost-basis" lies on a continuum and the Act does not mandate a specific degree of geographic disaggregation. The FCC acknowledged this fact, and attempted to alter it, when it promulgated rules specifying that each ILEC deaverage rates into at least three different zones. FIRST REPORT AND ORDER, paragraphs 764-65; see also § 51.507. The Eighth Circuit stayed the effect of this portion of the order. *Iowa Utilities Board v. FCC*, File No. 96-3321, Order Granting Stay Pending Judicial Review (October 15, 1996).

The Act does not preclude consideration of the impact of deaveraged rates on high-cost areas; rather, to some extent the Act requires it.

> [C]onsumers in all regions of the nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available *at rates that are reasonably comparable to rates charged for similar services in urban areas.*

The Act at § 254(b)(3), emphasis added.

The Commission has concerns about the implications of deaveraged rates for competition, and for service in high-cost areas. The Commission prefers to address this matter in US WEST's Generic Cost Proceeding. The FCC plans to issue new rules regarding subsidies for high-cost areas (Universal Service) on May 8, 1997, well before the anticipated conclusion of that proceeding. Additionally, the Commission intends to address Universal Service in Phase II of the Commission's local competition rulemaking, which will proceed concurrently with that docket. The generic cost proceeding will provide a forum, and the time, to give geographic deaveraging the attention it warrants.

3. Recovery for Loop Conditioning

a. The Arbitration Order

In some instances, US WEST may be required to improve existing loop facilities to enable a requesting carrier to provide digital services -- such as Integrated Service Digital Network (ISDN), High-Bit-Rate Digital Subscriber Lines (HDSL), and Asymmetrical Digital Subscriber Line (ADSL) -- that the existing facilities could not accommodate. In its December 2, 1996 Order, the Commission held that US WEST could charge the requesting carrier a fee to cover the cost of each "loop conditioning" request.

b. The Request for Reconsideration

AT&T argued that the cost of loop conditioning is included within the loop's Total Element Long-Run Incremental Cost (TELRIC), for which US WEST already receives compensation.

Alternatively, if the Commission cannot be persuaded that loop conditioning costs are included within TELRIC, then AT&T argued that US WEST be permitted to recover loop conditioning costs in the least discriminatory manner possible.

c. Commission Action

The Commission will clarify its December 2, 1996 Order. The Commission continues to believe that TELRIC does not compensate US WEST for its loop conditioning costs, and that US WEST should continue to recover up front its full loop conditioning costs from any requesting CLEC, at least in the interim. However, once the generic cost proceeding has been completed, loop conditioning charges should be recovered via a recurring monthly TELRIC-based charge to the CLEC. The monthly charge would be shared by all CLECs sharing in the benefit, proportionate to the percentage of benefits received. This practice would ensure that the full cost of an upgrade is not borne by the first LEC to request the upgrade. As an example, if a customer requests digital services (thereby causing the LEC to incur loop conditioning costs) and then changes LECs, the new LEC would also pay a share of the loop conditioning costs, and the old LEC might be able to avoid some loop conditioning costs.

L. Transport and Termination Pricing

1. Comparability of ILEC Tandem and CLEC Switch

a. The Arbitration Order

In its December 2, 1996 Order, the Commission held that the rates charged for call transport and call termination by a CLEC should be equal to the rates charged by US WEST.

b. The Request for Reconsideration

US WEST objected to paying the same rate for the use of the CLEC's end-office switch that the CLEC would pay for the use of US WEST's tandem switch. Parties that make use of tandem switches should pay more for the privilege, according to US WEST, because tandem switches serve a larger geographic area and more customers, and perform different functions,

than end-office switches.

c. Commission Action

Section 252(d)(2) of the Federal Act, Charges for Transport and Termination of Traffic, states:

> (A)... [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> ***
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.
>
> (B)...This paragraph shall not be construed--
>
> ***
>
> (ii) to authorize the [FCC] or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

The Commission reaffirms its December 2, 1996 Order in this regard and declines US West's request for reconsideration. A CLEC's switch may perform functions in addition to those of a tandem switch. The Commission also notes that the CLEC's switch transports calls, just as the LEC's tandem switch does. Therefore, for purposes of call transport and call termination rates, the switches perform an equivalent function, and warrant an equivalent rate.

2. Charges for Network Modification

a. The Arbitration Order

A new local telephone company that leases the use of the incumbent telephone company's facilities may ask the incumbent for a network of two-way trunks or other new capabilities. In its December 2, 1996 Order, the Commission found that the incumbent local telephone company should recover the cost of those new facilities from all the telephone companies that use the facilities, in proportion to each company's share of the traffic over the facilities.

b. The Request for Reconsideration

The Department acknowledges that facilities construction and modifications are one-of-a-kind undertakings and thus must have individualized costs, unlike unbundled network elements which have a standardized cost. Nevertheless, for purposes of the Act, the parties should determine both kinds of costs using TELRIC principles. The Commission's language was not entirely uniform on this point.

The Department indicated that in considering network development and modification costs, the Commission provided "for the allocation of development or modification costs based on each party's share of the traffic". The Department indicated that it considers TELRIC the appropriate methodology for determining the costs in this area. The Department requests that the Commission clarify this point.
In addition to clarifying how infrastructure improvements costs are to be determined, the

Department urges the Commission to clarify how these costs are to be recovered. The Department propounds three principles designed to promote competitive neutrality: 1) All beneficiaries of infrastructure development must share in the cost of that development to the extent of their benefit. 2) The incumbent as well as the competitors will likely benefit from infrastructure development. 3) The relevant beneficiaries are not merely those that request the improvement, but those who will benefit over the lifetime of the improvement. The Department argues that the Commission has been insufficiently clear in espousing the third principle above.

US WEST opposes the use of TELRIC analysis, or long-run recovery, for infrastructure improvements mandated by CLECs.

c. Commission Action

US WEST's concerns were heard and rejected in the initial Order. However, the Commission will grant the Department's petition for clarification of this aspect of the December 2, 1996 Order. The Commission will clarify the second sentence on p. 74 of its December 2, 1996 Order as follows:

> The Commission, therefore, will order parties to incorporate language into their contracts that provides for the recovery of development or modification costs from all beneficiaries of the improvements based on each beneficiaries share of the traffic. Such costs should be TELRIC plus a reasonable contribution.

3. Recovery for Tandem Switching and Transport Costs

a. The Arbitration Order

In its December 2, 1996 Order, the Commission adopted the per-minute costs for call termination, common transport, dedicated transport, and tandem switching that were generated by the Hatfield model.

b. The Request for Reconsideration

US WEST argued that the Commission lacked sufficient basis to adopt the rates that appear in the Consolidated Arbitration Order regarding call termination, common transport, dedicated transport, and tandem switching. According to US WEST, the Hatfield model is defective and unreliable, and the resulting rates will lead to undesirable consequences as discussed in the context of the Network Element Pricing discussion, above.

c. Commission Action

The Commission will deny US WEST's petition for reconsideration on this issue, for the reasons set forth in the context of the Network Element Pricing discussion, above.

M. Unresolved US WEST/MFS Issues

1. Late Payment Charges for Untimely Transmission of Switched Access Data

a. The Arbitration Order

In the December 2, 1996 Order, the Commission allowed MFS to impose certain performance standards and monetary incentives to ensure that US WEST's provision of switched access data is timely and correct. Under the adopted proposal, if US WEST does not transmit switched access detail usage data or switched access summary usage data within 90 days and in the appropriate format, and the delay results in a delay in MFS's IXC billing, MFS may bill US WEST late payment charges. If the switched access data is not submitted in the proper format within another 90 days of the original due date, billings for the associated traffic will be deemed "lost" and US WEST will be liable to MFS for the amount of the lost billings.

b. The Request for Reconsideration

US WEST asked the Commission to note that both ILECs and CLECs rely upon data obtained from the other; penalties should therefore at least be reciprocal. US WEST preferred, however, that no penalties be imposed. The fact that there are no such penalties in current contracts with ILECs demonstrates how unreasonable these penalties are. According to US WEST, the specific penalties are inequitable because a delay will not render the billing uncollectible. Under the Commission's decision, MFS can collect twice--first from US WEST under the penalty provision, and then from the IXC. Finally, US WEST stated that Commission-imposed performance penalties are not allowed under the Act, Federal Rules, or state law.

MFS responded that a requirement to provide fundamental billing information within 90 days reflects basic standards of commercial reasonableness. US WEST's position shows the low commercial standard US WEST is willing to permit; the Commission should reject such a standard. Finally, MFS noted that it has agreed that any penalties should be reciprocal.

c. Commission Action

The Commission continues to find that the generous time frames allowed under the Order are commercially reasonable means of protecting MFS from monetary losses from late or incomplete billing. While stating that the standards are "commercially unreasonable," US WEST has not shown that it is unable to abide by them.

The Commission will clarify that the 90 day requirement for providing switched access data, and associated penalty provision, are reciprocal. Although the reciprocity is contained in MFS's adopted language, the Commission will clarify this matter to ensure that parties understand that data obligations and associated penalties are mutual.

2. Separate Trunk Groups for Non-US WEST Local Traffic

a. The Arbitration Order

In the Arbitration Order, the Commission refused to require MFS to establish separate trunks for local calls going to US WEST and non-US WEST end users. US WEST had requested the separate trunks so that US WEST could bill in two ways: tandem switching and end office termination charges for those calls going to US WEST end-users; and only the tandem switching charge for calls going to non-US WEST end-users.

b. The Request for Reconsideration

US WEST continued to state that it requires separate trunking to distinguish US WEST from non-US WEST local traffic because it lacks the capability to determine the company serving the destination telephone number. US WEST further stated that there is no evidence that it is capable of developing the technology that would render the separate trunking unnecessary. US WEST asked the Commission to permit the continued use of separate trunk groups as an interim measure, while the ramifications of the Commission's decision are explored and the costs of developing the technology are assessed. US WEST stated that it would submit periodic reports during the interim period.

MFS stated that the Commission appropriately found that this issue concerns the removal of unnecessary barriers to competitive entry, as required under the Federal Act. The arbitration is not about "periodic reports," "continued exploration," or any further delay caused by US WEST.

c. Commission Action

The Commission finds no new fact or argument which warrants reconsideration of this issue. In the Arbitration Order, the Commission found that US WEST had not established that it was unable to develop the necessary technology to resolve this issue. Further, the necessary billing change would be a benefit to US WEST, MFS, and any other new entrants. Upon reconsideration, the Commission continues to reach the same conclusions.

US WEST asked for the use of separate trunk groups as an interim measure, "until the ramifications of the Commission's directive can be more fully explored and an informed decision made on this matter." The Commission finds that this vague interim measure can serve no useful purpose but further delay. The Commission reaffirms its December 2, 1996 decision on this issue.

3. Billing Cycle for Resold Services

a. The Arbitration Order

In the Arbitration Order, the Commission required US WEST to bill MFS for all amounts due for resold service within 90 days.

b. The Request for Reconsideration

US WEST stated that the Commission's decision presumably means that MFS will no longer be liable to pay US WEST for resold services if MFS does not receive a bill within 90 days. US WEST argued that such a penalty is not allowed under federal or state law and is disproportionate to any harm MFS might experience. Late billings do not necessarily become uncollectible; MFS could double-recover under the Commission's decision.

Noting that the telecommunications industry will experience disruption as local competition is introduced, US WEST asked the Commission for a grace period before these penalties are imposed. During the interim period, US WEST would provide progress reports on this issue.

MFS responded that US WEST should be held to a commercially reasonable standard of 90 days in which to provide billing. US WEST professes concern for Minnesota consumers but balks at allowing MFS the necessary information to provide timely billing.

c. Commission Action

The Commission noted in its Order that timely access to US WEST's billing information "is necessary both for MFS's revenue stream and for its ability to maintain its reputation within the carrier community." Arbitration Order at p. 78. US WEST's request for a grace period and offer to file progress reports do not address the concerns the Commission discussed in its Order. The 90-day time requirement is a commercially reasonable means of ensuring that MFS has a basic tool for providing service on a competitive basis. US WEST has the sole means of providing the tool, and has offered no compelling reason that it will be unable to do so within the reasonable time period provided.

The Commission reaffirms this portion of its Arbitration Order.

V. CONTRACT PROVISIONS

A. Criteria for Contract Review and Approval

The Federal Telecommunications Act of 1996 establishes a process in which state commissions review and approve interconnection agreements before the agreements can go into effect. 47 U.S.C. § 252(e). State commission approval is required of all interconnection agreements, whether they have been established by state commission arbitration or they have been developed by contractual negotiations. Section 252(e)(1) of the Federal Act requires state commissions to make written findings regarding "any deficiencies" they find in the agreements.

The Federal Act lists two grounds for rejection of agreements that have been arrived at through negotiation: 1) the agreement or a portion of it discriminates against a telecommunications carrier that is not a party to the agreement; or 2) the implementation of the agreement or portion of it is not consistent with the public interest, convenience, and necessity. 47 U.S.C. § 252(e)(2)(A).

Under § 252(e)(2)(B) of the Federal Act, a state commission may reject an arbitrated agreement if it finds that the agreement does not meet the requirements of § 251, including the regulations prescribed by the FCC pursuant to that section, or the pricing standards set forth in § 252(d). The state commission may also reject an arbitrated agreement or portion thereof which is not consistent with the public interest, as determined by the commission's general regulatory authority.

Section 252(e)(3) of the Federal Act preserves to state commissions the authority to review negotiated or arbitrated interconnection agreements to see that they meet the requirements of state law, including relevant state quality of service standards.

B. Introduction

The Commission carefully reviewed every term and condition of the Agreement submitted as a final contract between MCI and AT&T (in the contract, referred to as MCIm/AT&T) and US WEST. After careful analysis, the Commission finds that most terms of the Agreement are consistent with the standards of the Federal Act, relevant Minnesota law, and the public interest.

In some instances, the Commission found it necessary to modify the Agreement in order for the terms to meet the reviewing standards. In those cases, the Commission has explained its modification in written findings. The Commission includes those modifications and findings in the sections below.

The first portion of the Agreement, which contains general governing contractual principles, is discussed below in Sections C--Recitals and Principles; D--Scope of Agreement; and E--General Terms and Conditions. The second portion of the Agreement, which contains specific terms governing the provision of service, is discussed in Section F below--Other Contract Terms. For the sake of convenience, the discussion of this lengthy section of the contract is set out in matrix form and attached to the Order as Attachment A.

C. Recitals and Principles

1. The Contract Provision

This contract language sets the stage for the contract provisions to follow. It establishes the parties to the contract, the law (the Federal Telecommunications Act of 1996) under which the Parties' duties and obligations are set, and the basic history of the Parties' interconnection negotiations.

2. Commission Action

The Commission finds that the language in the Recitals and Principles section of the contract is satisfactory. Additional language is necessary, however, to establish the Commission's current and continuing jurisdiction over the arbitration proceeding and ensuing provision of local telephone service.

The Commission will therefore require that the following language be inserted in this section of the Agreement:

> **Whereas, the Parties had certain unresolved issues at the time they entered into a final contract, the Minnesota Public Utilities Commission (MPUC), pursuant to 47 U.S.C. § 252(b) has arbitrated and resolved those disputed issues. This Agreement reflects that resolution, as well as the Parties' negotiations, and is subject to the continuing jurisdiction of the MPUC.**
>
> **Whereas, the Parties are subject to the laws of the State of Minnesota and the United States with respect to the provision of telephone service, contract terms should be interpreted to be consistent with applicable laws.**

D. Scope of Agreement

1. The Contract Provision

In Subsection A of this section, the Parties state that the Agreement will set forth the terms, conditions, and prices under which US WEST will provide MCIm/AT&T services for resale and unbundled network elements. The Agreement also sets forth the terms and conditions for the interconnection of MCIm/AT&T's network to US WEST's network and for reciprocal compensation.

MCIm/AT&T may--at any time--add, delete, relocate or modify the local services, network elements or combinations under the Agreement. US WEST will not discontinue any network element, combination or local service under the Agreement without the prior written consent of MCIm/AT&T.

In Subsection B, the Parties agree to act in good faith and consistently with the intent of the Federal Act. No Party shall unreasonably delay or withhold necessary notice, approval or similar action.

Under Subsection C, US WEST shall not reconfigure, reengineer or otherwise redeploy its network in a manner which would impair MCIm/AT&T's ability to provide telephone service in a manner contemplated by the Agreement and applicable law.

2. Commission Action

US WEST objected to the provision in Subsection A which requires the prior written agreement of MCIm/AT&T before US WEST may discontinue any network element, combination or local service under the Agreement. The Commission agrees with US WEST that this wording would inappropriately hamper US WEST's flexibility and autonomy.

The Commission notes further that various provisions of state law prohibit the discontinuation of telephone service without Commission approval. The Commission particularly notes Minn. Stat. § § 237.12, 237.60, subd. 2(g), and 237.63, subds. 4(c) and 7. Parties are not free to discontinue service on the strength of a term written into a contract.

The Commission will therefore strike the phrase "without the prior written agreement of MCIm/AT&T" from the last sentence of Subsection A and insert in its place without the prior approval of the MPUC.

E. General Terms and Conditions

§ 1. Term

a. The Contract Provision

Under Clause 1.1 of this section, the term of the contract is five years. The clause provides that the contract "shall become effective as of the date specified above." However, no effective date is specified.

Under Clause 1.2, US WEST shall give MCIm/AT&T notice of the impending expiration of the Agreement, or any renewable term thereof, ninety days before such expiration. MCIm/AT&T have the right to extend the term of the Agreement for successive one-year periods at its expiration, upon notice to US WEST. At the Agreement's expiration, it shall continue in effect on a month-to-month basis until terminated by MCIm/AT&T.

b. Commission Action

Clause 1.1. At the February 3, 1997 meeting, the Commission established March 17, 1997 as the effective date for the contract. **The Commission will therefore delete the phrase "stated above" referring to the effective date, and insert: ordered by the MPUC under 47 U.S.C. § 252(e)(1). The sentence will then read: When executed by authorized representatives of US WEST and MCIm/AT&T, this Agreement shall become effective as of the date ordered by the MPUC under 47 U.S.C. § 252(e)(1).**

Clause 1.2. Equity requires that any extension of the Agreement must require consent of all Parties, rather than the unilateral action of MCIm/AT&T. **The Commission will therefore delete the phrase regarding termination "in its sole discretion" and substitute the phrase upon mutual agreement with US WEST**.

To further ensure that MCIm/AT&T and US WEST are treated equitably under the Agreement, **the Commission will delete the sentence "Each renewal shall be effective upon notice to US WEST by MCIm/AT&T" and substitute the following sentence: If the Parties cannot agree to renewal of this Agreement, any Party can petition the MPUC for arbitration of any outstanding issues**.

§ 2. Payment and Deposit

a. The Contract Provision

Clause 2.2 reflects the Parties' agreement that US WEST may require a suitable deposit as a guarantee of payment when companies cannot demonstrate sufficient financial integrity based on commercially reasonable standards. When MCIm/AT&T have established satisfactory

credit, through a specified level of performance as resellers, US WEST will credit the deposit to MCIm/AT&T.

Since the final Agreement was submitted, the Parties have agreed that US WEST will use the prime rate to calculate interest on the deposit. **The Commission will therefore insert as the last sentence to the second paragraph of Clause 2.2: Interest on the deposit shall be accumulated by US WEST at a rate equal to the prime rate.**

§ 4. Audits and Inspections

a. The Contract Provision

In Clauses 4.1, 4.2, 4.3, 4.4, 4.5, and 4.6, the Parties have agreed to procedures for conducting audits and inspections. The Parties did not agree, however, regarding the basic scope of the provisions. US WEST believed that Section Four should apply only to gateway systems audits and that no other audits are permitted under the Arbitration Order. MCIm/AT&T maintained that this Section pertains to audits in general.

b. Commission Action

In the Arbitration Order at p. 40, the Commission stated that the language adopted by the ALJ Panel establishing an audit procedure extended only to gateway system audits, not to broadly stated audit requirements. **The Commission will therefore insert before each reference to "services" in Clauses 4.1-4.6 the word gateway. The Commission will also change the title of the Section to: 4. Gateway System Audits and Inspections.**

The Commission also finds that a definition for the term "gateways" would help to clarify this provision. **The Commission will therefore add as the last sentence of Clause 4.1 of this section the Department's definitions of "gateways," as found in the Department's January 13, 1997 comments: As used herein, "gateways" refer to data used in the billing process for services performed and facilities provided and data relevant to the provisioning and maintenance for services performed or facilities provided**.

§ 7. Limitation of Liability

a. The Contract Provision

Clause 7.1 limits the liability of MCIm/AT&T to US WEST resulting from any and all causes other than those specified later at Clause 7.3--acts of willful or intentional misconduct, including gross negligence, or repeated breaches of any one or more of the material obligations of the Agreement. MCIm/AT&T's liability is limited to amounts due and owing to US WEST during the contract year in which the cause of action accrues.

Clause 7.2 limits the liability of US WEST to MCIm/AT&T resulting from any and all causes other than those specified at Section 8--Remedies for Failure to Meet DMOQs-- and Section 10--Nonexclusive Remedies. US WEST's liability is limited to any amounts due and owing to MCIm/AT&T pursuant to Service Parity, Service Guarantees and the Attachment related

thereto, plus any amounts due and owing to MCIm/AT&T under the Agreement during the contract year in which the cause of action accrues.

Clause 7.3 states that neither Party will be liable to the other for any indirect, incidental, special, or consequential damages arising out of or related to the Agreement. Notwithstanding the limitations mentioned above, a Party's liability shall not be limited by this Section in the event of acts of willful or intentional misconduct, including gross negligence, or repeated breaches of any one or more of the material obligations of the Agreement.

b. Commission Action

Contracts typically and appropriately create exceptions to limitations of liability for intentional or grossly negligent acts. Such exceptions are considered good public policy, as they encourage management to deter such actions. The Commission finds that the exception for acts subject to DMOQs is also appropriate, since the DMOQ concept brings its own measures of liability.

The Commission finds that the phrase in Clauses 7.1 and 7.2 limiting each Party's "liability...from any and all causes, other than as specified below..." requires clarification. The Commission would particularly like to clarify that the limitation does not extend to the causes of action such as patent infringement included in Section 5--Indemnification; and environmental contamination mentioned in Section 6--Responsibility for Environmental Contamination. In these sections the parties mutually indemnified themselves against liability for these causes of action, because they have very specific rather than general liabilities attached.

The Commission will therefore clarify Clauses 7.1 and 7.2 by adding specific references to Sections 5 and 6. The Clauses will now read:

> **7.1. Liabilities of MCIm/AT&T. MCIm/AT&T's liability to USWC during any Contract Year resulting from any and all causes, other than as specified below <u>and in Section 5-Indemnification-- and Section 6--Responsibility for Environmental Contamination</u>, shall not exceed the amount due and owing by MCIm/AT&T to USWC under this Agreement during the Contract Year during which such cause accrues or arises.**
>
> **7.2. Liabilities of USWC. USWC's liability to MCIm/AT&T during any Contract Year resulting from any and all causes, other than as specified below in Section 8 and Section 10, <u>and in Section 5-Indemnification-- and Section 6--Responsibility for Environmental Contamination</u>, shall not exceed the total of any amounts due and owing to MCIm/AT&T pursuant to Service Parity, Service Guarantees and the Attachment related thereto, plus any amounts due and owing by MCIm/AT&T to USWC under this Agreement during the Contract Year during which such cause accrues or arises.**

§ 8. Remedies for Failure to Meet DMOQs

a. The Contract Provision

Under Clause 8.1 of this section, US WEST will provide all local services, network elements or combinations in accordance with the Direct Measures of Quality (DMOQs) specified in the Agreement and attached thereto. Where DMOQs are not expressly specified, US WEST will provide the necessary services or service elements at a standard which is at least equal to the standard US WEST is required to provide under its own internal procedures or by law.

Under Clause 8.2, DMOQs are broken down into five categories. US WEST's failure to meet DMOQs may result in performance credits to MCIm/AT&T.

Under the terms of Clause 8.3, MCIm/AT&T have the right, in their sole discretion, to obtain alternative services or service elements from US WEST, at US WEST's expense, to replace any element for which a performance credit is due. If an alternative is not available from US WEST, MCIm/AT&T may turn to the least costly service available from an alternative vendor--at US WEST's expense.

In Clause 8.4, US WEST acknowledges that remedies at law alone are inadequate to compensate MCIm/AT&T for US WEST's failure to meet DMOQs, and that MCIm/AT&T may seek proper injunctive relief.

b. Commission Action

Under Clause 8.3 as written, MCIm/AT&T may obtain a service or service element from an alternative vendor, at US WEST's expense, if a performance credit is currently due from US WEST and US WEST does not have a suitable alternative. The provision could be construed to require US WEST to both continue paying performance credits and to underwrite the purchase of the alternative service. If so construed, the provision would be unfair to US WEST and would violate the basic contractual principle of election of remedies. **The Commission will therefore strike the last sentence from Clause 8.3 and will substitute: <u>If MCIm/AT&T obtain an alternative Network Element, Combination, or Service from another vendor, MCIm/AT&T may elect either to continue collecting Performance Failure Credits or Delay Credits from US WEST or to require US WEST to be fully responsible for all obligations to the vendor and to pay in full all charges associated with the cost of such replacement Network Element, Combination, or Service.</u>**

§ 9. Warranties

a. The Contract Provision

This section generally provides that each Party shall perform its obligations under the Agreement at a performance level no less than the highest level that it uses for its own operations, or those of its affiliates. In no event shall a Party use less than reasonable care in the performance of its duties under the Agreement.

Under Clause 9.2, US WEST warrants that it will provide local interconnection in a competitively neutral fashion, at any technically feasible point requested by MCIm/AT&T. To the extent US WEST meets its burden of proving technical infeasibility, US WEST must provide MCIm/AT&T an alternative interconnection point subject to the same terms, conditions, and price as the requested interconnection point.

Under Clauses 9.3 through 9.12, US WEST warrants that it will provide to MCIm/AT&T, in a competitively neutral and nondiscriminatory fashion, network elements, services, access, systems, transport and its components, local switching and its functional components, interim number portability, and all other terms under the Agreement.

Under Clauses 9.6 and 9.7, if US WEST is unable to meet its burden of proving the technical infeasibility of providing unbundled transport or any unbundled transport components, or unbundled local switching or its functional components, US WEST shall provide MCIm/AT&T suitable alternative facilities which will not impair MCIm/AT&T's ability to provide telecommunications service. The alternative facilities must be technically equivalent to those requested and will be subject to the same terms, conditions, and price.

Under Clause 9.11, US WEST warrants that, with respect to local resale, order entry, provisioning, installation, trouble resolution, maintenance, customer care, billing and service quality will be provided to MCIm/AT&T at a level of quality which allows MCIm/AT&T in turn to provide local resale at a standard equal to the highest level of quality US WEST provides for its own retail local service. US WEST further warrants that it will impose no restrictions on MCIm/AT&T's resale of these services unless specifically specified by the FCC.

In Clause 9.12, US WEST warrants that it will provide, on a nondiscriminatory basis, space on its premises for MCIm/AT&T's requested physical or virtual collocation of equipment necessary for interconnection and access to unbundled network elements.

b. Commission Action

Clause 9.2. If US WEST proves that a point of interconnection (PI) is technically infeasible, US WEST cannot be held to provide an alternative at the same price as the originally requested PI. The price of the alternative should instead be cost-based, as provided in § 252(d)(1)(A)(I) of the Federal Act. **The Commission will therefore delete the word "price" from the phrase "and shall be subject to the same terms, conditions and price as the requested PI" in the last sentence of the clause. The Commission will add the following further sentence to the clause: The price of the alternative PI shall be cost-based, as provided in 47 U.S.C. § 252(d)(1)(A)(I).**

Clauses 9.5 and 9.3. These clauses are essentially the same. Clause 9.3 was part of the original AT&T contract adopted by the Commission, while Clause 9.5 was added by the Parties in response to the Commission Arbitration Order.

The clauses overlap somewhat and in many instances are redundant. **Because Clause 9.3 contains the more inclusive language, the Commission will retain that clause and delete Clause 9.5 from the Agreement.**

Clauses 9.6 and 9.7. If US WEST proves that it is technically infeasible to provide unbundled transport or any unbundled transport components, or unbundled local switching or its functional components, US WEST cannot be expected to provide alternative facilities at the same price as those requested. **The Commission will therefore delete the word "price" from the last sentence of these clauses. The Commission will add the following further sentence to each of the clauses**: **The price of the alternative facilities shall be cost-based, as provided in 47 U.S.C. § 252(d)(1)(A)(I).**

Clause 9.11. The clause as it stands simply requires that US WEST provide services associated with resale "at the highest level of quality US WEST provides for itself." In the Arbitration Order, however, the Commission found that new entrants have the right to require the incumbent to meet a higher standard of service, provided that the higher standard is not technically infeasible. Order at p. 55. **The Commission will therefore insert the phrase at least in the second to last sentence of this clause, to make the new phrase "at a level of quality at least equal to that highest level of quality US WEST provides for itself."**

In the Arbitration Order, the Commission also showed its general intent to require a new entrant to pay a proportionate share of the incumbent's costs incurred due to the new entrant's service requests. In the case of quality of service requests, the Commission will only require MCIm/AT&T to pay a portion of additional costs if they request a level of service beyond what US WEST would already be required to provide under applicable Commission Orders and Rules. **The Commission will therefore add the following sentence before the last sentence of Clause 9.11: If MCIm/AT&T require US WEST to meet a standard of service higher than the highest standard US WEST provides itself, and beyond the specific mandates in applicable Commission Orders or Rules, MCIm/AT&T shall pay a reasonable portion of US WEST's additional cost of providing the higher quality of service.**

The Commission also notes that, in the last sentence of this clause, US WEST warrants that it will impose no restrictions on MCIm/AT&T's resale unless specifically sanctioned by the FCC. **Since the Commission in its Arbitration Order imposed resale restrictions on US WEST, the Commission will delete the term "FCC" and substitute MPUC in the last sentence.**

Clause 9.12. The Commission established specific requirements for the collocation process in the Arbitration Order. The FCC has also addressed collocation issues in its Interconnection Rules. **The Commission will therefore add the following final sentence to this clause: In order to be valid, MCIm/AT&T's collocation requests must be consistent with MPUC and FCC requirements.**

§ 10. Nonexclusive Remedies

a. The Contract Provision

Clause 10.1 of this section provides that, unless otherwise expressly provided in the Agreement, remedies under the Agreement are cumulative and are in addition to remedies available at law or in equity.

Clause 10.2 allows MCIm/AT&T to sue in equity for specific performance, and precludes US WEST from raising as a defense the availability of an adequate remedy in damages.

Under Clause 10.3, if US WEST fails to switch a subscriber to MCIm/AT&T service when so requested, US WEST shall reimburse MCIm/AT&T for all charges paid by the subscriber from the time of US WEST's failure to switch until the switch is effected. This remedy is in addition to all other remedies available to MCIm/AT&T under this Agreement or otherwise.

Under Clause 10.4, all rights of termination, cancellation, or other remedies prescribed in the Agreement are cumulative and not intended to be exclusive of other remedies available at law or in equity. The imposition of performance credits under Attachment 11 is not considered inconsistent with any other remedy.

b. Commission Action

While the Commission recognizes that Parties must be able to choose from a variety of possible remedies to enforce the Agreement, the Commission does not wish to allow any Party a windfall or double recovery under the terms of this provision. **The Commission will therefore add a new Clause 10.5:**

> **10.5. While Parties may elect remedies from those available at law, in equity, or under the terms of the Agreement, and such remedies may in some cases be cumulative, Parties in no event shall use their election of remedies to secure a double recovery of damages.**

§ 12. Nondisclosure/Confidentiality and Proprietary Information

a. The Contract Provision

Under Clause 12.1 of this provision, all information which is disclosed by one Party to the other in connection with the Agreement will automatically be deemed proprietary to the Discloser and subject to the nondisclosure provisions of the Agreement, unless otherwise confirmed in writing by the Discloser. All orders for local services, network elements or combinations placed by MCIm/AT&T pursuant to the Agreement, and information that would constitute Customer Proprietary Network Information of MCIm/AT&T customers will be deemed Confidential Information of MCIm/AT&T.

Clauses 12.2-12.8 establish procedures for handling Confidential Information.

b. Commission Action

These provisions contain normal and appropriate contract terms. The Commission notes, however, that this contract extends beyond the typical commercial agreement. The terms of this Agreement will govern the provision of telephone service in Minnesota by the major incumbent and two significant new entrants. It is therefore necessary for the Commission to have access to documents related to the Agreement so that the Commission can ensure that the provision of service under the Agreement is consistent with the public interest.

The Commission will therefore add the following Clause 12.9: <u>The Parties recognize and agree that the Commission may obtain any and all records of the Parties the Commission considers necessary to fulfill its duties under Minnesota and federal law</u>.

§ 13. Option to Obtain Local Services or Network Elements under Other Agreements.

a. The Contract Provision

Under this provision, if US WEST enters into an agreement with another party or files a tariff to provide local services, network elements or combinations, US WEST shall provide such agreement or tariff to MCIm/AT&T within five days of the date it is signed, at the same prices, terms and conditions.

b. Commission Action

Section 252(I) of the Federal Act provides as follows:

> AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

In its Interconnection Order, the FCC expanded this concept to require local exchange carriers to offer the services upon the same *rates*, terms and conditions as those found in the other agreement. The Eighth Circuit Court of Appeals stayed this portion of the FCC Interconnection Order, pending resolution upon appeal.

This issue is clearly in a state of development in the FCC and the federal courts. The Commission therefore finds that binding contract language at this point could misdirect parties and require further unnecessary amendment proceedings. **For these reasons, the Commission will delete Section 13 in its entirety and substitute the following language which will tie the Parties' further treatment of the issue with its eventual resolution by the FCC, other federal and state regulatory bodies and the courts: <u>The Parties agree that the provisions of Section 252(I) of the Act shall apply, including final state and federal interpretive regulations in effect from time to time.</u>**

§ 14. Customer Credit History

a. The Contract Provision

Under this provision, the Parties agree to make available to a designated credit bureau certain customer payment history information for each person or entity that applies for local or intraLATA toll service. The information will be provided on the condition that the credit bureau will only make the information available to the carrier to which the person has applied for service.

b. Commission Action

Minn. Rules, part 7810.1500 governs deposit requirements and a utility's assessment of a customer's credit history. The rule allows a utility to determine if its own customer has established good credit with that utility, with certain restrictions. The utility must find that the customer has established good credit if the customer, within the last 12 months, has not had service disconnected for nonpayment of a bill and has not been liable for disconnection of service for nonpayment of a nondisputed bill. The utility may not require a deposit or a guarantee of payment based upon income, home ownership, residential location, employment tenure, nature of occupation, race, color, creed, sex, marital status, age, national origin, or any other criterion which does not bear a reasonable relationship to the assurance of payment.

As competition is established, Minnesota's rule will continue to govern utilities' assessment of customer credit. The rule is contrary to the proposed contractual provision in a number of ways. The rule does not allow the trading of credit information between utilities. The rule does not allow the gathering of information such as unpaid balances or length of service with prior provider, which are beyond the carefully restricted scope of information allowed.

Local telephone companies currently providing service in Minnesota work with the terms of Minn. Rules, part 7810.1500 as they establish and implement policies for assessing customers' creditworthiness. The Commission expects telephone companies to continue to abide by the rule as the market is opened to more local providers.

Because Minn. Rules, part 7810.1500 continues to govern utility credit issues in Minnesota, and because the proposed contract language is contrary to the rule in many respects, **the Commission will delete Section 13 in its entirety and will substitute the following sentences: The Parties agree that they will provide service to their customers under governing MPUC rules. Issues relating to the assessment of customer creditworthiness will be governed by Minn. Rules, part 7810.1500, related or successor rules, and relevant MPUC Orders.**

§ 15. Branding

a. The Contract Provision

This section provides that services shall, at MCIm/AT&T's sole discretion, be branded as MCIm/AT&T's services. MCIm/AT&T may determine how their services and interfaces with their customers will be branded.

b. Commission Action

As determined in the Arbitration Order and further clarified in this Order, the costs of branding must be borne by the Party requesting the branding. Rates for branding will be negotiated by the Parties or resolved by the Commission in further proceedings.

The Commission will therefore add as Clause 15.2 of this section: The costs of branding will be borne by the Party requesting the branding. Rates for branding will be negotiated by the Parties or resolved by the Commission in further proceedings.

§ 16. Patents/Trademarks

a. The Contract Provision

Clause 16.1 of this section states that the Agreement shall not be construed as the grant of a license, either express or implied, with respect to any patent, copyright, logo, trademark, trade secret or any other proprietary or intellectual property currently or hereafter owned by any Party. MCIm/AT&T may not use any logo, trademark or other intellectual property right of US WEST without executing a separate agreement.

Under Clause 16.2, neither Party shall publish or use the other Party's logo, trademark, service mark, name, language, pictures, or symbols or words from which the other Party's name may reasonably be inferred, unless the Parties mutually agree to the use.

b. Commission Action

Clause 16.1. The Commission will add language to this section requiring the parties to update the Commission on any agreements allowing the use of another's logos, trademarks, names, or other intellectual property. This requirement will prevent any confusion resulting from the interchange of these items--thereby preserving the Commission's ability to monitor the provision of telephone service and to ensure the accurate flow of information to consumers.

The Commission will add the following sentence as the last sentence of Clause 16.1: The Parties will file with the Commission any agreements between the Parties which allow one Party to use another's logo, trademark, name, or other intellectual property. The filing shall include the agreed upon compensation for such use.

Clause 16.2. This section is slightly inconsistent with the preceding clause. Clause 16.1 states that MCIm/AT&T may not use any intellectual property right of US WEST without a separate written agreement; Clause 16.2 states that, unless otherwise mutually agreed upon, neither Party shall use the other's intellectual property in any product, service, advertisement, promotion, or other publicity matter.

At the February 3 hearing, the parties agreed that the second clause could be deleted without harm to the contract. US WEST proposed a substitute provision which would address the issue of compensation for one Party's use of the other Party's intellectual property. The other parties objected to the proposed language.

The Commission finds that compensation for the use of another party's intellectual property is a new issue which was not previously negotiated or arbitrated. It is therefore not necessary to a complete contract and would be better addressed in the future, when the Commission has had the opportunity to afford it a more complete analysis. The Commission will therefore not address this issue within the context of the contract. The Commission will instead set up a procedure to address this issue in the future: If any party wishes to amend the contract to include a provision covering the issue of compensation for the use of another party's intellectual property, the parties shall file joint language for the contract amendment. If the

parties are unable to develop joint language, each party shall file alternative language and the matter will come before the Commission for resolution.

Because Clause 16.2 is somewhat inconsistent with Clause 16.1, and the parties have agreed that Clause 16.2 is unnecessary for a satisfactory contract, the Commission will delete Clause 16.2 in its entirety.

§ 19. Waiver

a. The Contract Provision

Under this contract term, no waiver of any provision of the Agreement or consent to any default under the Agreement shall be effective unless it is in writing and properly executed by the Party against whom the waiver or default is claimed. No course of dealing or failure to strictly enforce a contract term shall be construed as a general waiver or relinquishment of any such provision. Waiver by either Party or any default by the other Party shall not be deemed a waiver of any other default. By entering into the Agreement, MCImetro/AT&T do not waive any right granted to them pursuant to the Act.

b. Commission Action

Unlike most commercial contracts, this Agreement has been in large part ordered and set in place by the Commission, pursuant to its duty under § 252 of the Federal Act. The Commission has established contract language to ensure that the Agreement results in "rates, terms and conditions that are just, reasonable, and nondiscriminatory," as required under § 252(c) of the Federal Act. The Commission has also established contract language that ensures the Parties' conformity with Minnesota telecommunications law.

Under these circumstances, waiver or default under the Agreement could seriously jeopardize the public interest. The Commission will therefore require Commission approval before the Parties engage in waiver or default of any term of the Agreement. Commission approval of any waiver or default of a contract provision will ensure that the Parties' actual performance under the Agreement, as well as the terms themselves, conform to the public interest. **The Commission will add the phrase <u>and approved by the Commission</u> to the first sentence of the section.**

The Commission also notes that the last sentence of the section, which states that MCIm\AT&T do not waive any right under the Act by entering into the Agreement, does not include US WEST and is therefore one-sided. **The Commission will add <u>and US WEST</u> to the last sentence.**

§ 20. Governing Law/Compliance with Laws

a. The Contract Provision

Under Clause 20.1 of this section, the Agreement will be deemed to be a contract made under and construed in accordance with the laws of the state of Minnesota. Insofar as matters of federal law or regulation are exclusively concerned, the Parties agree to the exclusive

jurisdiction of the federal court for the state of Minnesota. Issues exclusively arising under state law or regulation may be heard by the state court of jurisdiction.

US WEST, at its own expense, will be solely responsible for obtaining from governmental authorities, building owners, or other carriers or entities, all rights and privileges (including, but not limited to, space and power) necessary for US WEST to provide the Network Elements and Local Services under the Agreement.

Under Clause 20.2 of this section, US WEST is required to keep in effect all federal and state approvals necessary to perform under the Agreement, and AT&T/MCImetro are required to keep in effect all federal and state approvals necessary to serve their customers.

The rest of Clause 20.2 deals with the Parties' obligations in the event of regulatory, legislative, judicial, or other legal actions affecting material terms of the Agreement.

b. Commission Action

Clause 20.1. No Party may reasonably expect another Party to waive any constitutional arguments it may have to a federal court reviewing the Commission's decisions in the arbitration. **To clarify this issue, the Commission will require the following language be added to this clause**: **No party waives the right to pursue any constitutional objections it may have to a federal court reviewing the MPUC's decisions in this arbitration.**

US WEST's costs of obtaining the rights and privileges necessary to implement local service are not separate from its other costs of service to MCIm\AT&T. **The Commission will clarify this clause by adding the following language: This provision should not be construed to mean that US WEST's costs of obtaining the rights and privileges necessary to provide the Network Elements and Local Services pursuant to the Agreement will not be included in US WEST's costs of service to MCIm\AT&T.**

Clause 20.2. Section 252(I) of the Federal Act states: "A local exchange carrier shall make available any interconnection, service, or network element under an agreement approved under this section upon the same terms and conditions as those provided in the agreement." The Eighth Circuit Court of Appeals has stayed the portion of the FCC Rules which adds the concept of "rates or prices" to "terms and conditions."

The last sentence of the second paragraph of this clause reads: "In no event shall USWC file any tariff that purports to govern Local Service, Network Elements or Combinations that is inconsistent with the rates and other terms and conditions set forth in this Agreement." Since this provision seems to apply to any tariff that US WEST files, not just those relating to AT&T and MCImetro, **the Commission will require the word "rates" to be deleted to bring the sentence into conformity with the current interpretation of the Federal Act**. **The last sentence of the second paragraph will now read: In no event shall USWC file any tariff that purports to govern Local Service, Network Elements or Combinations that is inconsistent with the terms and conditions set forth in this Agreement.**

US WEST objected to the pre-approval language of the second paragraph of Clause 20.2, which reads: "USWC shall: (b) provide to MCIm/AT&T its proposed tariff and obtain MCIm/AT&T's agreement on the form and substance of such tariff prior to such filing..." The

Commission agrees that this provision unnecessarily restricts US WEST's commercial flexibility and freedom. If MCIm\AT&T believe that a future US WEST tariff is in conflict with the provisions of their Agreement, they have available dispute resolution procedures under the Agreement and Commission complaint procedures. **The Commission will therefore require that subsection (b) of the second paragraph of Clause 20.2 be deleted.**

US WEST also objected to the third paragraph of Clause 20.2, which incorporates into the Agreement the terms and conditions of US WEST's tariffs, if US WEST is ordered not to file tariffs with the state regulatory commission or the FCC, or is permitted not to file tariffs and elects not to do so. According to US WEST, this provision is inappropriate because it would remove any benefit of detariffing.

AT&T replied that this is a consumer protection provision. If a service AT&T purchases from US WEST is no longer available, this provision would assure AT&T that it could offer the service to its end-users.

The Commission finds that this provision is unnecessary and in conflict with the overall direction of the new competitive era. The Commission agrees that the proposed language would take away any benefits of detariffing, rendering the Agreement inflexible in the face of competitive changes. **The Commission will strike the third paragraph of Clause 20.2.**

§ 21. No Third-Party Beneficiaries

a. The Contract Provision

Under this section, the Agreement does not provide and shall not be construed to provide third parties with any remedy, claim, liability, reimbursement, cause of action or other privilege, except as specifically set forth in the Agreement.

b. Commission Action

As the Commission previously noted, this Agreement is more than an ordinary commercial contract. The Agreement marks the Commission's exercise of its authority to set terms and conditions which are consistent with the Federal Act, Minnesota law, and the public interest. The Commission has the duty to ensure that the public interest is served in matters concerning telecommunications. The Commission will therefore modify this provision to ensure that the Commission, on behalf of the general public, can exercise its rights and privileges as a third-party beneficiary of the contract. **The Commission will require the following language to be added to this provision: <u>The MPUC, on behalf of the public, is a third-party beneficiary of the contract and is entitled to receive notice of, and to intervene in, any law suit that is filed pertaining to this Agreement.</u>**

§ 25. Severability

a. The Contract Provision

Under this section, if any term, condition, or provision of the Agreement is held to be invalid or unenforceable, the entire Agreement shall not be invalidated, unless such construction would be unreasonable. The Agreement, and Parties' rights, will be construed and enforced as

if the Agreement did not contain the invalid provision. If the invalid provision is an essential contract element, the Parties will promptly negotiate a replacement provision.

b. Commission Action

This Agreement is a product of the Commission's duty to ensure that contract terms arising from negotiation and arbitration form a complete contract which is just, reasonable, nondiscriminatory, and consistent with the public interest. Under these circumstances, the typical contract concept of "Severability" could be contrary to the public interest. **The Commission will therefore modify this section to ensure that the Commission receives notice of any possible invalidation of a provision of the Agreement , or renegotiation of the invalidated provision. The Commission will require the following language to be added to this section**: **If any term, condition, or provision of the Agreement, or the Agreement in its entirety, is construed to be invalid or unenforceable pursuant to this section, the Parties shall notify the Commission of the construction. If the Parties negotiate a replacement provision or provisions pursuant to this section, the Parties shall submit the new provision to the Commission for its review. If the Parties cannot agree on a replacement provision, the Parties shall submit the issue to the Commission for resolution.**

§ 26. Amendments

a. The Contract Provision

Under this section, no amendment or waiver of any provision of the Agreement, and no consent to any default under the Agreement, shall be effective unless it is in writing and signed by the Party against whom the default or waiver is claimed. No failure to strictly enforce a term shall be construed as a waiver of the term. By entering into the Agreement, MCIm\AT&T do not waive any rights under the Federal Act.

b. Commission Action

The last sentence of this provision, which states that MCIm\AT&T do not waive any rights under the Act, has been extended to US WEST and included under Section 19--Waiver. **The Commission will therefore strike the last sentence of this section.**

The Commission will also add the following language to bring this section into conformity with Section 19: **No amendment, waiver, or consent to default under this Agreement shall be effective without approval of the MPUC.**

§ 28. Notices

a. The Contract Provision

This section provides that any notices or communications required under the Agreement shall be in hard-copy writing and delivered to specified parties at the offices of US WEST, AT&T, and MCImetro.

b. Commission Action

The Commission will add to the list of parties to whom notices or other communications must be given or delivered:

Executive Secretary
Minnesota Public Utilities Commission
121 Seventh Place East, Suite 350
St. Paul, MN 55101-2147

§ 29. Joint Work Product

a. The Contract Provision

This section states that the Agreement is the joint work product of the Parties. For convenience, the Agreement was drafted in final form by one of the Parties. In the event of ambiguities, no inferences will be drawn against either Party solely on the basis of authorship.

b. Commission Action

Parties differed regarding the true nature of this contract. AT&T stated that the contract is now partly negotiated and partly ordered; US WEST has had an opportunity for input during the process. AT&T stated that the Joint Work Product provision could be deleted. MCImetro stated that common law would provide that ambiguities would be construed against the drafter, absent the provision. MCImetro suggested changing the title to "Authorship" and retaining the portion on construing ambiguities. US WEST stated that the contract is AT&T's and ambiguities should be drawn against AT&T. US WEST asked that such a statement be inserted, or that the paragraph be deleted.

The Commission finds that there is no need to define the authorship of the contract within the terms of the contract. Absent an express statement, the general provisions of common law will govern interpretation of any ambiguous terms. Generally held and understood tenets of contract law can be applied in this case. **The Commission will delete this section.**

§ 31. Referenced Documents

a. The Contract Provision

Under this section, any reference in the Agreement to a technical reference or practice of the Parties shall be deemed to be a reference to the most recent version or edition. In the event of any inconsistency between or among publications or standards, MCIm\AT&T shall elect which requirements shall apply.

b. Commission Action

The Commission finds that the last part of this section unfairly grants to two of the three contract Parties the right to select among conflicting requirements. **The Commission will require that the last sentence be stricken, and the following two sentences substituted: In the event that a Party finds an inconsistency between or among publications or standards, the Parties shall attempt to negotiate a mutually satisfactory resolution of the**

inconsistency. If the Parties are unable to reach mutual agreement on the issue, they shall submit the issue to the MPUC for resolution, as provided in Part 11 of the contract--Dispute Resolution.

F. Other Contract Terms

The specific terms by which this interconnection agreement will be implemented are contained in the body of the contract and certain attachments.

The Commission carefully reviewed each provision contained in the contract. After conducting its analysis, the Commission found that the terms were for the most part consistent with the provisions of the Federal Act and governing FCC Rules, Minnesota telecommunications law, and the public interest. In some cases, the Commission found that it must modify the terms to meet the reviewing standards. In those cases, the Commission made the modifications to the contract as shown in Exhibit A attached to this Order.

The Commission's discussion of the Other Terms of the Contract and the Commission's required modifications is contained in Exhibit A attached to this Order.

VI. CONCLUSION

Having carefully considered the issues presented in this proceeding, the Commission has made the following decisions:

The Commission denies US WEST's request for a stay.

The Commission partially grants and partially denies AT&T's motion to strike certain documents presented as evidence by US WEST.

The Commission grants certain requests for clarification and denies the remaining requests for reconsideration, as discussed in this Order.

Pursuant to § 252(e) of the Federal Act, the Commission approves the MCImetro-AT&T/US WEST interconnection agreement, with the modifications discussed in this Order.

ORDER

1. The Commission denies US WEST's request for a stay.

2. The Commission grants AT&T's motion to strike the Field Letter; the Amici Brief; and the September, 1996 paper presented to the NRRI Conference. The Commission allows the Kruzick affidavit into evidence for the limited purpose described in the Order. The Commission denies AT&T's motion to strike in every other respect.

3. The Commission refers to the generic cost proceeding, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540 the issues of US WEST's costs of connecting and upgrading a NID and US WEST's costs of construction when asked by a CLEC to build a facility in an area not yet served, or to provide more facility than US WEST would provide its own customers, or when an end-user requests a service which necessitates either scenario.

   The Commission denies the Department's and MFS's requests for reconsideration of the issue of US WEST's costs of construction.

4. The Commission clarifies its December 2, 1996 Order regarding US WEST's recovery of construction charges as follows: If benefits of construction will be shared among the requesting CLEC, US WEST, and potentially other CLECs, US WEST's recovery will be limited to a percentage share of the charges, based on a reasonable estimate of the benefits each party will receive.

5. The Commission clarifies that dark fiber is a network element, which US WEST must unbundle under the terms of the Federal Act and FCC Rules.

   The Commission confirms that all provisions of the Federal Act, the FCC Interconnection Order, and the Commission's Arbitration Order regarding unbundled network elements will apply to dark fiber, with one exception: if US WEST anticipates the need to use specific fiber within a time period shorter than the term of the overall interconnection agreement, US WEST may negotiate a separate term for the lease of dark fiber.

6. The Commission clarifies that US WEST must file proposed rates for repair and maintenance branding within 45 days of a CLEC's specific request.

7. The Commission clarifies its December 2, 1996 Order as follows regarding the measurement and recovery of US WEST's costs of providing access to operational support systems:

   > With respect to interface costs, the Commission will project the demand for particular interfaces over the lives of the facilities and establish prices for each interface based on TELRIC costs plus a reasonable contribution from all future beneficiaries of each interface, including US WEST if the company benefits from an interface. US WEST must develop such interfaces as are reasonably necessary for efficient operations.

8. The Commission clarifies that MFS's position on the method of recovery of interim number portability costs (Exhibit 62, p. 37) represented a compromise of MFS's position on this issue for purposes of the interconnection agreement.

9. The Commission clarifies its December 2, 1996 Order regarding access for MCImetro and AT&T to US WEST's directory assistance databases: MCImetro and AT&T are allowed access into US WEST's directory assistance databases to enter or change their own customer information and to read the incumbent's and other CLECs' customer information. MCImetro and AT&T will not be allowed to electronically transfer US WEST's databases.

10. The Commission clarifies that the MFS/US WEST 90 day requirement for providing switched access data, and associated penalty provision, are reciprocal.

11. If any party wishes to amend the contract to include a provision covering the issue of compensation for the use of another party's intellectual property, the parties shall, within 30 days of receiving the party's request, file with the Commission proposed joint language for the contract amendment. If the parties are unable to develop joint language, each party shall within the 30 day period file alternative language for the Commission's consideration.

12. The Commission clarifies its December 2, 1996 Order regarding recovery for loop conditioning as follows: US WEST will continue to recover up front its full loop conditioning costs from any requesting CLEC in the interim period. When the generic cost proceeding has been completed, loop conditioning charges should be recovered via a recurring monthly TELRIC-based charge to the CLEC. The monthly charge would be shared by all CLECs sharing in the benefit, proportionate to the percentage of benefits received.

13. The Commission clarifies its December 2, 1996 Order regarding charges for network modification as follows: The Commission will order Parties to incorporate language into their contracts that provides for the recovery of development or modification costs from all beneficiaries of the improvements based on each beneficiary's share of the traffic. Such costs should be TELRIC plus a reasonable contribution.

14. The Commission denies the parties' requests for reconsideration in every other respect.

15. The Commission initiates an inquiry into the appropriate quality standards and incentives in US WEST's interconnection agreements with AT&T and MCImetro in Docket No. 442,5321,421/CI-97-381, In the Matter of the Quality Standards and Incentives in US WEST Communications, Inc.'s Interconnection Agreements with AT&T Communications of the Midwest, Inc., and MCImetro Access Transmission Services, Inc. The Commission invites interested parties to file, within 30 days of the date of this Order,

    - proposed measurable service quality standards that they believe to be necessary regarding US WEST's relations with AT&T and MCImetro, and
    - proposed incentive mechanisms and levels to encourage compliance with the service quality standards.

The Commission further invites interested parties to file, within 30 days thereafter, responses to the proposals, including a statement supporting or opposing

- each proposed measurement,
- the standard proposed for that measurement,
- each mechanism, and
- the level proposed for that mechanism.

16. The Commission approves the final contract pursuant to § 252(e) of the Federal Act, with the modifications set out in the Order and Attachment A.

17. Within 30 days of the date of this Order, the parties shall file a compliance filing consisting of the final contract modified to reflect the Commission's decisions in this Order.

18. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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